IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 262

THE SHAW-WALKER COMPANY, a corporation; and ROBERT B. HILLYARD and WALTER S. HILLYARD, doing business as SHINE-ALL SALES COMPANY, and LEAH B. WILSON,

Petitioners,

vs.

THE NATIONAL BENEFIT LIFE INSURANCE COMPANY, a corporation; and GILBERT A. CLARK and FRANK B. BRYAN, JR., Receivers of The National Benefit Life Insurance Company, a corporation (appointed in Equity Cause No. 53,391),

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia, and Brief in Support Thereof.

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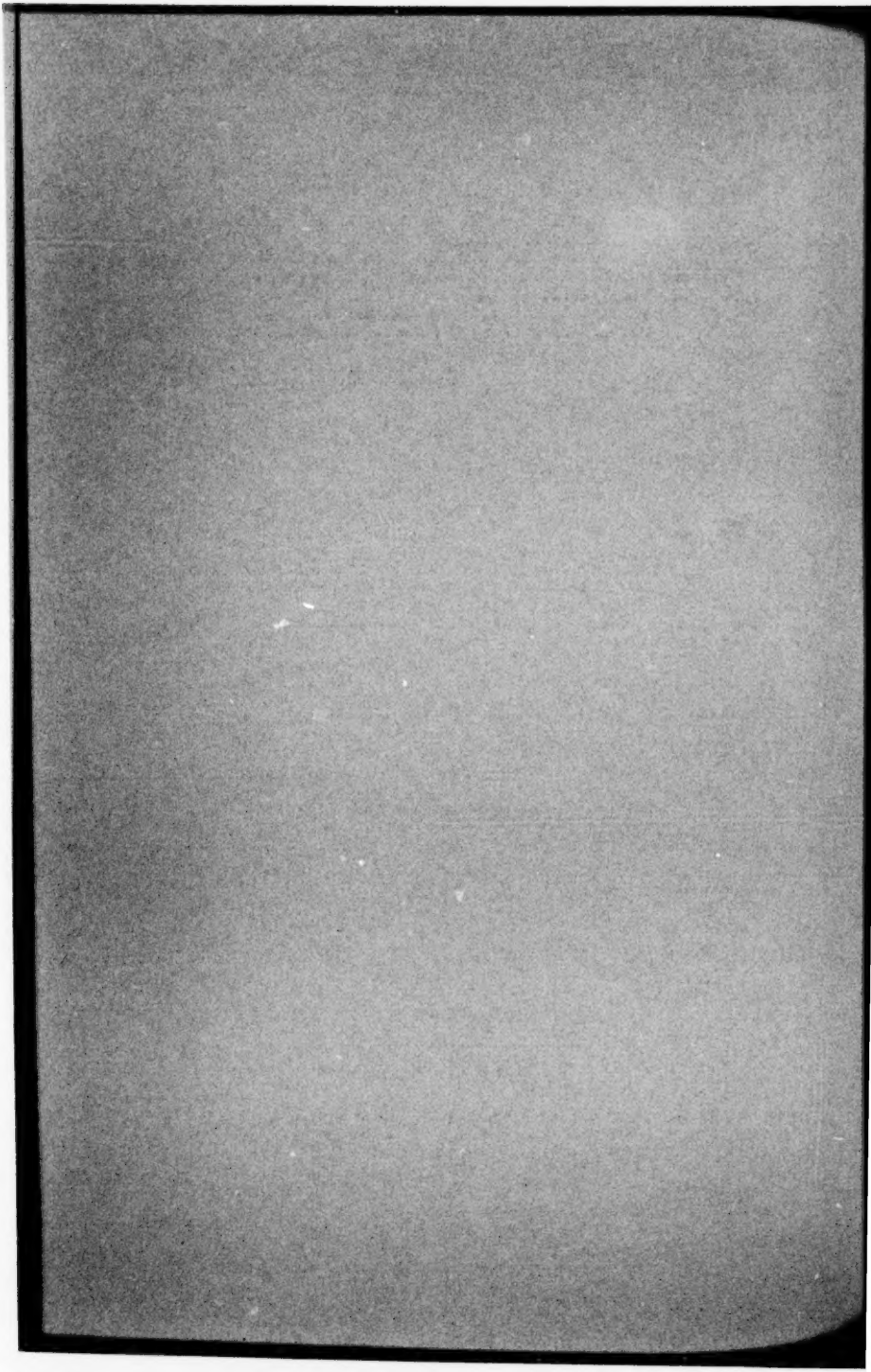
THE REPORTER COMPANY, Inc., Walton, N. Y.
1940



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THE SHAW-WALKER COMPANY, a corporation, and ROBERT B. HILLYARD and WALTER S. HILLYARD, doing business as Shine-All Sales Company, and LEAH B. WILSON,
Petitioners,

vs.

THE NATIONAL BENEFIT LIFE INSURANCE COMPANY, a corporation, and GILBERT A. CLARK and FRANK B. BRYAN, Jr., Receivers of The National Benefit Life Insurance Company, a corporation (appointed in Equity Cause No. 53,391),
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

The petition of The Shaw-Walker Company, a corporation, Robert B. Hillyard and Walter S. Hillyard, doing business as Shine-All Sales Company, and Leah B. Wilson, respectfully represents as follows:

I.

Petitioners are appellees and respondents are appellants in an equity cause in the United States Court of Appeals for the District of Columbia, being No. 7376, special calendar, on the docket of said Court.

II.

That by the opinion and decree of Justice Rutledge, concurred in by Chief Justice Groner and Associate Justices Stephens—only three of the six members of the said United States Court of Appeals—entered on January 8, 1940 (R. 500), the final decree of March 6, 1939 (R. 130), of the District Court of the United States for the District of Columbia (Justice Gordon) in favor of your petitioners (plaintiffs and interveners in the trial court), decreeing

(1) that the respondent, The National Benefit Life Insurance Company, a District of Columbia insolvent life insurance corporation, be involuntarily dissolved, appointing a receiver, awarding injunctive relief, and decreeing an accounting and distribution of assets of the corporation amongst its creditors,

(2) that a decree passed February 29, 1932, in a case entitled *John Randolph Pinkett v. said Insurance corporation,* Gilbert A. Clark and Frank B. Bryan, Jr., permanent Receivers of said corporation (Equity 53,391), was void for lack of jurisdiction (R. 132), staying equity cause 53,391 (R. 132), and

(3) that this dissolution suit supersedes said equity cause 53,391, was reversed. The cause was remanded to the trial court without granting any relief to petitioners herein (Opinion, Justice Rutledge, R. 515).

Petitioners timely filed (R. 517) petition in the Court

of Appeals specifically praying for a rehearing and reargument before the full bench of the Court, consisting of the Chief Justice and five Associate Justices, but on February 21, 1940, the said petition was denied, including denial of rehearing, without opinion (R.565).

Inasmuch as the usual procedure, which, we contend, is unauthorized, in the United States Court of Appeals for the District of Columbia, is that only *three* of the *six* Judges of the Court sit in the hearing and disposition of cases appealed to that Court, your petitioners, prior to the date when this case would be called for oral argument, filed a motion (R.475), requesting that the Chief Justice and the five Associate Justices sit in the hearing and disposition of this case, particularly in view of its importance. Before oral argument, the Court entered an order denying the right of your petitioners to present their cause "before a full bench" (R.476). The Court required petitioners to argue and submit their cause to Chief Justice Groner and Associate Justices Rutledge and Stephens, and those three of the six Judges of the Court heard and decided the case (R477).

III.

That upon the petition of your petitioners, filed on May 18, 1940, in the Supreme Court of the United States, for an extension of time within which to file their petition for the allowance of a writ of certiorari, this Honorable Court, per Mr. Chief Justice Hughes, entered an order, dated May 18, 1940, providing that, for good cause shown, such time was extended for a period of sixty days from May 21, 1940. (R. 569)

IV.

The opinion of Justice Rutledge (not yet reported in official volume) in which Chief Justice Groner and As-

sociate Justice Stephens concurred (Associate Justices Miller, Edgerton and Vinson did not sit or participate in the hearing or disposition of this case) is contained in the transcript of record at pages 500-515. The opinion is also set forth in advance sheets of Federal Reporter (2d), pages 497-510, issue June 17, 1940, and is to be reported in 111 Fed. (2d) 497-510. It was published in 68 Washington Law Reporter, 426-434, issue May 3, 1940.

The opinion of the trial court (District Court of the United States for the District of Columbia, Justice Gordon presiding), in favor of petitioners herein, is set forth in the transcript of record, at pages 106-117, and is also contained in 67 Washington Law Reporter, 125-128, issue February 10, 1939. See his finding of facts (R. 118-129) and conclusions of law (R. 129-130).

V.

Substantially, the instant statutory proceeding is as follows:

On May 12, 1933, petitioner The Shaw-Walker Company, a corporation, having previously obtained a judgment against respondent The National Benefit Life Insurance Company, a District of Columbia insolvent corporation (a life insurance company for colored people, and which formerly conducted business in the District of Columbia and in approximately twenty-five states of the United States), filed its original bill (R. 1-9) in equity in the District Court of the United States for the District of Columbia, against said Insurance Company, *as sole defendant* (Equity 55,677), for the statutory involuntary dissolution of said insolvent domestic corporation, pursuant to the provisions of the 1929 Code of Laws for the District of Columbia (see Chap. 13, title 5, secs. 409-419, both incl., and secs. 396-397, both incl.,

same as secs. 786-791, both incl., secs. 793-797, secs. 773-774, chap. XVIII, 1924 D. C. Code, as amended), set forth in appendix hereto.

Petitioners Robert B. and Walter S. Hillyard, trading as Shine-All Sales Company, judgment-creditors of defendant corporation, upon whose judgment execution issued, which was returned unsatisfied, intervened (R. 120), as did petitioner, Leah B. Wilson, a policyholder (R. 177-8). Each joined in the prayer of the Shaw-Walker bill (R. 194-5).

VI.

Section 416, title 5, 1929 D. C. Code, appendix (same as sec. 794, 1924 D. C. Code, as amended) provides:

> "416. Involuntary dissolution at the suit of creditors.—When any corporation in the District has remained insolvent for a year, or has neglected or refused for that period to pay and discharge its notes or other evidences of debt, or has, for that period, suspended its ordinary and lawful business, a bill may be filed by the District Attorney, as aforesaid, for the dissolution of said corporation, or, if he shall decline to do so, on the application of any judgment-creditor of said corporation, the said judgment-creditor, if an execution upon his judgment shall be returned unsatisfied, in whole or in part, may file such bill."

Sec. 409, title 5, 1929 D. C. Code (same as sec. 786, 1924 D. C. Code as amended), set forth in appendix hereto, authorizes the District Attorney of the United States for the District of Columbia to file a petition for the involuntary dissolution of a District of Columbia corporation, and the above quoted section 416 authorizes a judgment-creditor of any corporation to file such a petition, under the conditions mentioned in said section 416, if the District Attorney shall decline to do so.

VII.

The bill (R. 1-10) of The Shaw-Walker Company, corporation, among other things set forth:

> (1) that plaintiff was a judgment-creditor of said defendant corporation, upon which execution was issued and duly returned wholly unsatisfied, and that said judgment, interest and costs remain wholly unsatisfied;
>
> (2) that defendant corporation has remained insolvent for a year *and over;*
>
> (3) that defendant corporation has neglected *and* refused for that period to pay and discharge its notes *and* other evidences of debt, including plaintiff's judgment, interest and costs, *and*
>
> (4) for that period, suspended its ordinary and lawful business;
>
> (5) that before filing its bill, plaintiff applied to the district attorney to file suit for the dissolution of said corporation, as provided by the D. C. Code (sec. 409, title 5, see appendix), and that the district attorney declined to do so, advising the plaintiff, through its counsel, that he did so decline, and that the plaintiff was at liberty to bring suit if it saw fit to do so (R. 7).

The bill contained all of the other necessary allegations to comply with section 416, title 5, 1929 Code, *supra,* for a decree dissolving said corporation (R. 1-10), with appropriate prayers (R. 7-9).

As the decree of the trial court, in the instant case, in decreeing that the corporation should be dissolved, also decreed (R. 132) that the Court had no jurisdiction, in a previous case entitled *John Randolph Pinkett against said corporation* (Equity 53,391), to enter its decree (on February 29, 1932), said *Pinkett* case will now be referred to:

The 5th paragraph of the Shaw-Walker bill (R. 3-4) alleged that upon a bill filed by one John Randolph Pinkett, in his individual right, against the defendant corporation, in the district court, the assets of the defendant were placed in the custody of a temporary receiver, Daniel C. Roper, on, to wit: September 24, 1931, and so continued in exclusive control of its properties to and including February 29, 1932, when said temporary receiver was succeeded by the appointment of Gilbert A. Clark and Frank B. Bryan, Jr. (respondents), as so-called permanent receivers, by decree entered in equity cause No. 53,391, *and that since said last-mentioned date said alleged permanent receivers have assumed and exercised complete control of the affairs of the defendant company, and that during all of said time, and for a long time prior thereto, the defendant company was and still is insolvent, and that during all of said time the so-called temporary and permanent receivers for said company neglected and refused to pay and discharge the defendant's notes or other evidences of its debts, as the same accrued and became due, and for such period suspended its ordinary and lawful business and continuously failed in the performance of its corporate functions and responsibilities, abandoned its charter privileges, and same now stands so abandoned by said defendant corporation, and all of its affairs have been surrendered to and have been performed by said so-called temporary and permanent receivers.*

IX.

The above mentioned Pinkett bill for a receiver to conduct the life insurance business of the insolvent corporation (R. 136-145) alleged (R. 140) that there was due and unpaid to policyholders for death, sick and accident claims, a sum in excess of $100,000; for unpaid surrender values, $150,000 (R. 140); that the corporation had obligated itself as guarantor or indorser for $250,000

(R. 141); that former officers had speculated in stocks and lost $462,355.20 of the corporation's funds (R. 142); that a receiver for the company had been appointed in Georgia (R. 142); that commissioners in Georgia and in other states had suspended its licenses to write contracts of life insurance (R. 142-3); that the corporation is insolvent and its financial condition very precarious; *that its capital is impaired and there will be required a sum in excess of one million dollars to make up its impairment and legal reserve in order to obtain permission from the several Insurance Commissioners to do business* (R. 143).

The Shaw-Walker bill also sets forth (R. 4) that the Pinkett bill, filed September 24, 1931 (R. 136-149), while captioned "Bill for Receiver and Dissolution," was merely a bill for the appointment of Receivers to operate, manage and control a life insurance company, *in insolvency,* in the District of Columbia and elsewhere throughout the United States as prayed therein, and that a court of equity had no jurisdiction to grant such relief (see secs. 171-174, incl., 176-177, 179, 181, title 5, 1929 D. C. Code, set forth in Transcript of Record, pp. 482-6); that it was also alleged that the Pinkett bill was not one for the dissolution of the corporation because it did not comply with, or contain any of the necessary allegations provided by section 769, 1924 D. C. Code (same as sec. 392, title 5, 1929 D. C. Code). This was conceded by opposing counsel and also by Justice Adkins (R. 12) in overruling motion to dismiss the Shaw-Walker bill. The same ruling was made on final hearing by Justice Gordon, who heard the instant proceeding for dissolution of the corporation (R. 116). It was also conceded by Justice Rutledge, of the Court of Appeals, in his opinion in the instant case, concurred in by Chief Justice Groner and Justice Stephens (R. 504).

X.

The aforesaid *Pinkett* suit was heard on final hearing on February 29, 1932 (R. 157), before Justice O'Donoghue, holding District Court, when he, erroneously, viewing the supposed equity of the Pinkett bill as being one for the dissolution of the said corporation (see his opinion, R. 154-156), which it is not, and which was subsequently conceded by counsel for all parties, as well as by trial and appellate Judges, as above set forth, entered a final decree (R. 157-8), declaring the corporation insolvent, and appointing Gilbert A. Clark and Frank B. Bryan, Jr. (respondents herein), permanent Receivers, with authority and direction to carry on the business and to administer the affairs of the company (*with the exception of writing new insurance*), which decree was in excess of the jurisdiction of the Court. The decree in the *Pinkett* case also provided (R. 158)—likewise in excess of the jurisdiction of the Court—that the Court would defer a decree for the dissolution of the corporation until after the final report by Receivers Clark and Bryan, Jr., embodying a detailed and actuarial account and report by them so as to afford ample opportunity to said company, its officers, stockholders, and/or policyholders to formulate and effectuate any plan for the rehabilitation or reorganization of said company, independently, or with the co-operation of the Receivers, subject to the approval of the Court (R. 158). No decree of dissolution of the corporation was ever entered in the *Pinkett* case, or could be, nor was the company ever rehabilitated or reorganized.

The opinion of Justice O'Donoghue (R. 155), among other things, sets forth:

> "This Court is not unmindful of the fact that there are nearly 200,000 poor people that are interested in this litigation, many of whom have

> put all of their little savings in this company to insure them something in a day of stress or in a time of need."

Justice O'Donoghue's decree was entered on February 29, 1932 (R. 157) and to this date no liquidating dividend has been paid by Receivers Clark and Bryan to policyholders and other creditors.

Justice Gordon held Justice O'Donoghue's decree void, and the opinion of Justice Rutledge of the Court of Appeals (concurred in by Chief Justice Groner and Justice Stephens) held it valid in the instant case.

It is significant that no findings of fact or conclusions of law were made by Justice O'Donoghue, holding the District Court, in the *Pinkett* case.

XI.

The facts pertaining to the setting-up and the total collapse of an illegal insurance business conducted by the Pinkett Receivers, Clark and Bryan, in Equity Cause No. 53,391, resulting in a loss of over one million dollars of assets belonging to the creditors of the insolvent corporation, as disclosed by the record herein.

Notwithstanding the decree in the *Pinkett* case prohibiting the writing of new life insurance business (R. 157), but in keeping with the unlawful purpose, plan and scheme of the Pinkett bill (R. 137-145), praying for Receivers "with full power and authority to manage, operate and control," first, by temporary receivers and then by permanent receivers, a life insurance company, *in insolvency,* Justice O'Donoghue, on April 8, 1932—thirty-nine days after the date of his final decree—entered an *ex parte* order (R. 275-277), based upon the

petition of Receivers Clark and Bryan, which authorized and directed the Receivers to set up a life insurance business,

> authorizing and directing them: (1) to ascertain, by actuarial and accounting examination, the interests of all policyholders in the defendant corporation as of the close of business on September 9, 1931; (2) *to ascertain the value of all policyholders' equities as of September 9, 1931, in terms of paid-up insurance and cash dividend,* and to report to the court for further instructions in the event said values were less than the obligations assumed by the defendant corporation under its contracts with said policyholders; (3) to represent to policyholders that, if on final accounting, the amount of the impairment and insolvency of the defendant corporation is determined to be greater than the amount of paid-in capital and surplus, the equities of the policyholders in the assets of the defendant corporation will be fixed as of September 9, 1931, the day prior to the filing of the plaintiff's (*Pinkett's*) bill of complaint; (4) *to modify, with the consent of the policyholder,* in each case, *any and all existing contracts of insurance of The National Benefit Life Insurance Company, upon such terms as may be mutually agreeable and which permit the receivers to accept premium payments from the policyholders on an equitable basis and will permit the receivers to meet the obligations assumed in such modification agreements* provided, that all such agreements shall be subject to ultimate determination by the court that the paid-in capital and surplus of the defendant corporation is less than the impairment and insolvency with full restoration of all contract rights of policyholders in the event that the defendant corporation is found to be able to meet in full its obligations or is restored to a condition of solvency; the said order of April 8, 1932, also provided that no equity or asset of value shall be created for stockholders out of any concessions or waivers made by policyholders; that said order of April

8, 1932 (R. 275-277) authorized and directed said Receivers as follows: (1) *to enter into agreements modifying existing contracts of insurance only upon sound actuarial advice and the general plan, purpose and effect of such modifications, with such adaptations as shall be required by the various forms of insurance contracts.* shall be: (a) *to reduce the amount of insurance benefit payable to such amounts of insurance as the premiums being paid would in each case purchase on the first premium date after September 9, 1931;* (b) *to remove temporarily, the liability of the defendant corporation arising under provisions for non-forfeiture, loan and cash surrender values;* (c) to reduce liability by eliminating total and permanent disability provisions as well as additional accident benefits, with suitable adjustments therefor; (d) required said receivers to keep separate account of funds received for premium payments after September 9, 1931, and to charge against such funds all expenses pertaining thereto; (e) *required said receivers to set up proper legal reserves on the modified contracts;* (f) *authorized the receivers to make investments from funds received from such payments;* (g) the receivers were authorized to pay death claims arising on the modified contracts; (h) *authorized the* receivers to revive and keep in force, as modified, all *insurance contracts in force on September 9, 1931;* (i) *authorized the receivers to make all such modified contracts participating insurance with the right to policyholders to share in the surplus earnings of such contracts, the receivers to take such steps as may be necessary to carry out any obligation assumed in accordance with the foregoing general plan of modification* (R. 275-277).

XII.

On May 3, 1932, Daniel C. Roper, temporary receiver in the *Pinkett* case, who operated the insolvent insurance business of the defendant corporation from September

9, 1931 (R. 228), to February 29, 1932, when he resigned (R. 228), filed his final report and accounting, setting forth, among other things, that the insurance company owned assets, *in the sum of $3,768,472.12* (R. 238), and that he turned over said assets to his successors, Clark and Bryan, permanent receivers.

On April 29, 1932, Receivers Clark and Bryan, respondents herein, filed (R. 296) their report under equity rule 69, setting forth that at the time of filing their bond the value of the assets of the insolvent insurance company was *$3,768,472.12* (R. 296), *in which was listed $143,922.78 in cash* (R. 289).

Acting under the said order of Court, dated April 8, 1932, Receivers Clark and Bryan, proceeded to illegally use the assets of the insolvent company turned over to them by the temporary receiver, *in the initiation and promotion of their modified insurance program, entering into new contracts of insurance with approximately 65,000 policyholders of the insolvent defendant corporation* (R. 161), *collecting premiums in excess of one million dollars ($1,000,000)* (R. 376-386) *from the policyholders who accepted the Receivers' modification plan, and paying claims arising under the said modified contracts of insurance on the basis of 100% on the face value of said modified contracts of insurance* (R. 372, 385).

The unlawful operation of the life insurance business of the Receivers of the insolvent defendant corporation, under orders of the Court, as prayed in the Pinkett bill, all of which was in excess of the jurisdiction of the Court, and in violation of the local statutes prohibiting an insolvent life insurance company, or its officers or solicitors, to write contracts of insurance (secs. 171, et seq., title 5, 1929 D. C. Code, R. 482-486), resulted disastrously to creditors of the defendant corporation.

After operating for seventeen months, the Court in the *Pinkett* case entered an order, dated August 31, 1933 (R. 159), based upon the petition of Receivers Clark and Bryan, *instructing them to discontinue the collection of premiums upon all policies of insurance* (R. 159) *theretofore modified by them under the said plan of modification, authorized by the Court* (R. 160), *and providing for liquidation by sale of all property, except books, papers and documents of the company* (R. 160).

On December 8, 1937, Receivers Clark and Bryan filed in the *Pinkett* case their final report (R. 160-169) and attached their account thereto (R. 420-422). Said account, entitled "Consolidated Statement of Cash Receipts and Disbursements" (R. 422), discloses that for the first time the Receivers consolidate *the modified* and *the unmodified* insurance businesses of the insolvent company and the insolvent receivership, and it further discloses for the first time that the Receivers report only for the period, March 1, 1932, to November 30, 1937 (R. 422), whereas in all their previous reports they covered the period from September 9, 1931, to the date of each of their respective reports. The said report also discloses (R. 422) the Receivers' account for income for the said mentioned period, in the sum of $1,337,948.26 (R. 422) and disbursements in the sum of $1,101,487.46 (R. 422), AND A BALANCE FOR DISTRIBUTION TO ALL CREDITORS IN THE SUM OF $236,460.80 (R. 422)!

Based upon the last named amount set forth by Receivers Clark and Bryan, being the sum available for distribution to creditors, has now been reduced from the sum of $1,985,987.29 (R. 401), or, approximately, twenty per cent, the ratio of assets to liabilities, to the sum of $236,460.80 (R. 422), or, approximately, four

per cent. The last named sum and percentage are subject, of course, to be reduced by preferred claims and the cost of distribution, *but the alarming problem confronting the creditors is the effect that the liability, in the sum of $7,813,308* (R. 377) *of insurance contracts entered into unlawfully by Receivers Clark and Bryan, in excess of the jurisdiction of the Court in the Pinkett case, with 36,567 policyholders* (R. 377) *of the insolvent defendant corporation, which were in force, according to the report of said Receivers, filed with the Court in the Pinkett case on July 10, 1933* (R. 372), *or the sum of $7,025,138 of insurance contracts entered into by said Receivers Clark and Bryan in the Pinkett case with 35,671 policyholders of the insolvent defendant corporation, which were in force on June 30, 1933* (R. 391), *as shown by the report of Receivers Clark and Bryan, filed by them in the Pinkett case on August 26, 1933* (R. 385). *The said report further discloses that many of the aforementioned contracts of insurance run for periods of 35 to 50 years, every one of which was breached by Receivers Clark and Bryan without previous notice to policyholders and without affording them an opportunity to be heard, and without any refund of premiums collected, which is disclosed by the sworn petition of said Receivers Clark and Bryan for instructions* (R. 381-385), *upon which the order of liquidation, signed on August 31, 1933, was based* (R. 159-160).

If all of the remaining assets in the hands of Receivers Clark and Bryan were used in refunding what they collected from parties to their insurance contracts, the same would be insufficient by several hundred thousand dollars and not one cent of the assets valued at $3,768,472.12 on the date of insolvency would be available to pay dividends to creditors of the defendant corporation.

XIII.

Among other void orders passed in the *Pinkett* case, of which case Justice Gordon's decree in this dissolution suit (reversed by decree of Justice Rutledge of the Court of Appeals) adjudicated that the trial court had no jurisdiction (R. 132), two unusual ones should be mentioned (1) *ex parte* order of Chief Justice Wheat, dated December 21, 1931 (R. 227), upon the petition of the temporary receiver of defendant corporation (R. 225-7), whereby said temporary receiver was authorized and directed to remove from this jurisdiction, parts of the assets of said insolvent corporation (having its principal business and domicile in the District of Columbia) consisting of all of the mortgages, mortgage notes, fire insurance policies, certificates of title and all other papers relating to said mortgages, where the same are secured on property located in the State of Georgia, "aggregating a considerable sum of money in excess of $200,000" (R. 225, petition, temporary receiver), to be turned over to Daniel C. Roper and Lewis A. Irons as ancillary receivers of the defendant corporation for the State of Georgia, *and to accept the receipt of said ancillary receivers for said assets* (R. 228). These prime assets were never returned to this jurisdiction nor were the proceeds derived therefrom ever paid over to the temporary receiver, or to his successor Receivers, Clark and Bryan, in the *Pinkett* case, or in any manner accounted for in the latter case other than a mere receipt therefor as indicated by the order of Chief Justice Wheat; (2) *ex parte* orders authorizing and directing Clark and Bryan, Receivers, to withdraw certain bonds and securities aggregating $100,000, which had been deposited by said insurance company on December 14, 1925 (R. 297-302), prior to receivership, with the Commissioners of the District of Columbia, under

written trust agreement (R. 299-301), in trust for the benefit of any and all policyholders (R. 297); that said Receivers withdrew said bonds and securities (R. 302-5); order was entered authorizing sale (R. 305-8); order entered authorizing Receivers to hypothecate said bonds and securities (R. 308); order entered (R. 312), authorizing and directing Receivers to apply proceeds from sale or hypothecation of the bonds and securities to the payment of expenses of temporary receivership as directed to be paid by them by order dated March 27, 1933, which provided for payment of $15,000 to temporary receiver for services and $12,000 to his counsel for services (R. 310-311).

XIV.

Process and a copy of the bill for dissolution were duly served upon the president of the defendant insurance company (R. 179). Respondents Gilbert A. Clark and Frank B. Bryan, Jr., the so-called custodian Receivers of the defendant corporation in the previous equity suit (No. 53,391) entitled *John Randolph Pinkett v. The National Benefit Life Insurance Co.* (and not the corporation), assuming to act in behalf of the corporation, filed on May 27, 1933, a motion to consolidate this dissolution suit with the so-called *Pinkett* case (which had been already heard, on final hearing, on February 29, 1932) (R. 157-8), but the motion was denied (R. 177).

The so-called Receivers (respondents Clark and Bryan, Jr.) filed (R. 10-11) on June 21, 1933, a motion to dismiss this dissolution suit, but that motion was denied (R. 13) by Justice Adkins of the District Court, who rendered a written opinion (R. 11-13), holding that, notwithstanding the pendency of the *Pinkett* suit, the plaintiff was entitled to maintain this dissolution suit.

Thereupon, said custodian Receivers, Clark and Bryan,

Jr. (respondents herein), assuming to exercise the corporate function and powers of the defendant corporation, filed an answer (R. 14-18), in which they prayed for a dismissal of the bill.

STIPULATION.

A stipulation (R. 19) was entered into between counsel for the plaintiff and counsel for said custodian Receivers (the corporation not appearing to contest the dissolution suit) in which the substantial allegations of the bill of complaint were conceded (R. 19-22), and the cause was heard upon final hearing upon bill, answer of Receivers, stipulation and oral evidence (R. 24-100). The 9th paragraph of the stipulation provided that, subject to objections as to the relevancy, materiality and competency, the Court, without formal proof thereof, may consider any and all records, papers, pleadings and orders of Court in anywise connected with the case of *John Randolph Pinkett v. The National Benefit Life Insurance Company* (Equity 53,391), pending in the trial court (in which Clark and Bryan, Jr., had been appointed permanent receivers) and no objection being made, the said record in that case was considered by the Court (R. 22).

At final hearing of this dissolution case, counsel for the custodian Receivers *conceded* that the plaintiff, Shaw-Walker Co., petitioner herein, was entitled to a decree of dissolution of said defendant corporation.

On page 79 of the transcript of record, the following appears:

> *"The Court: You cannot go outside the allegations of the pleadings. What they have alleged in the pleadings has all been admitted.*
>
> *"Mr. Laws: It has practically all been admitted. I have not made any objection to any question*

intended to show anything in Mr. David's pleadings.

"Mr. David: Do you think there ought to be dissolution?

"Mr. Laws: I think eventually there should be.

"Mr. David: What do you mean by 'eventually'?

"Mr. Laws: I think after the case is closed out, the assets disposed of—the real estate.

"Mr. David: I thought so.

"Mr. Laws: After the real estate has been disposed of.

"Mr. David: The attorneys for the Receivers won't leave anything.

"Mr. Laws: You get a lot of joy out of my saying 'asset' and not 'real estate.'"

(Messrs. Laskey and Laws were counsel for Receivers Clark and Bryan, and Mr. David was of counsel for the plaintiff.)

On page 37 of the record, the following appears:

"The Court: In this suit that Mr. David has, is there any question that they are entitled to an order of dissolution?

"Mr. Laskey: *I think not. They are entitled to a holding of dissolution, except that it is within the discretion of the Court as to when it shall be dissolved.* We claim that there is some little real estate and that the preservation of the corporate (R. 38), entity might be a necessity in order to pass title to it. So, we contend that if the Court comes to that conclusion, it might be, in the discretion of the Court, wise to postpone that.

"The Court: Then it narrows itself down to the point that they are entitled to receivers. Then, according to the statute, if there is dissolution, the Court must appoint a receiver? Somebody has to do it?

"Mr. David: Certainly; the statute says so.

"Mr. Laws: The statute does not make it mandatory. The proposition is very plain that if the

> Court feels that the public interests require it, the Court shall do it; the statute is far from being mandatory."

At final hearing of the instant case, Mr. Laws, counsel for Receivers Clark and Bryan, stated to the Court they had no evidence to offer except what was before the Court by way of stipulation (R. 98). The stipulation (R. 19-22) substantially concedes the correctness of the essential allegations of the plaintiff's suit for dissolution of the corporation.

XV.

The District Court (Justice Gordon presiding) entered a final decree (R. 130-133) in favor of the plaintiffs, judgment-creditors, decreeing that (1) they were entitled to a decree of involuntary dissolution of the defendant insurance corporation; (2) restraining the corporation, its trustees, directors and officers, and also Gilbert A. Clark and Frank B. Bryan, Jr., as alleged receivers in the *Pinkett* case (Equity 53,391) from collecting or receiving any debt or demand due to the defendant corporation, and restraining Clark and Bryan from acting as or claiming to be receivers for the defendant, and from exercising any corporate rights and franchises of the defendant; (3) that this dissolution suit *supersedes* the case entitled *John Randolph Pinkett v. The National Benefit Life Insurance Company,* a corporation, Equity No. 53,391; (4) that no jurisdiction existed or exists in the Court *in the Pinkett case* to dissolve the defendant corporation, or to appoint receivers therein, and that the decree appointing said Clark and Bryan receivers was thereby declared void and of no legal effect whatsoever; (5) that all further proceedings in the *Pinkett* case be permanently stayed; (6) appointing John T. Risher receiver, and requiring an undertaking of $50,000; (7) re-

quiring said receiver to file a report, setting forth the assets and liabilities of the defendant; (8) making certain allowances to counsel, and (9) reserving the authority to make further orders or decrees that may be necessary (R. 132-3).

XVI.

The defendant corporation did not appeal from the final decree of Justice Gordon, holding District Court, dissolving the corporation (R. 133), but on March 7, 1939, the attorneys for the custodian Receivers Clark and Bryan, assuming to act for said defendant corporation as though said Receivers constituted the corporation itself and exercised the powers incident to the franchise of the corporation, filed a notice of appeal in the clerk's office (R. 133-4). No appeal was requested by the said Receivers, or by their counsel, of the trial judge, nor was his permission obtained by any order, or otherwise, which authorized the custodian Receivers to appeal from the decree dissolving the corporation.

The record sets forth (p. 134) "Memorandum March 22, 1939 Bond on Appeal for $250.00 filed." One who had never seen that bond might conclude that the defendant corporation had signed it. In our counter-designation (R. 315), we requested that a copy of the bond be included in the record, which was done (R. 209-210). This discloses that the defendant corporation, by its President or any other officer thereof, never signed said bond. The bond is signed "The National Benefit Life Insurance Company, by Gilbert A. Clark, Frank B. Byran, Jr., Receivers, The National Benefit Life Insurance Company." The Fidelity and Deposit Company of Maryland, By Eugene Halley (seal), Attorney in fact, is the surety thereon (R. 209-210). The National Bene-

fit Life Insurance Company is not described in the bond as a corporation, and no officer thereof executed the same, and the corporate seal is not attached thereto.

XVII.

The appeal was docketed by the custodian Receivers of the defendant corporation in the Court of Appeals on March 30, 1939. On April 1, 1939, your petitioners (appellees) filed (R. 425) a motion in the Court of Appeals to dismiss the appeal on various grounds, including the striking (1) the name of The National Benefit Life Insurance Company, corporation, as party appellant, (2) the names of Gilbert A. Clark and Frank B. Bryan, Jr., Receivers of said corporation, as parties appellants, the Receivers not being parties in this dissolution suit, (3) the names of their counsel as attorneys for said corporation; and praying that Receivers Clark and Bryan show cause (a) by what authority they prosecuted this appeal, (b) and that their counsel show cause by what authority they noted an appeal as attorneys for said corporation; (c) and that said Receivers show cause by what authority they affixed the signature of The National Benefit Life Insurance Company to the bond of $250 on appeal, and also by what authority said Gilbert A. Clark signed the name of Frank B. Bryan, Jr., to the alleged appeal bond, or by what authority another signed the name of said Bryan to said alleged appeal bond.

XVIII.

On April 1, 1939 (R. 439) Thurman L. Dodson, Esq., entered his special appearance in the Court of Appeals for the defendant insurance company, and filed the consent of the said defendant corporation to the motion of

your petitioners to dismiss the said appeal, and advised said Court of Appeals that the corporation did not desire to prosecute the appeal (R. 469), annexing thereto a copy of a letter of John T. Risher, President of the defendant corporation, to Receivers Clark and Bryan, dated April 5, 1939 (R. 472), requesting said Receivers to instruct their counsel to withdraw the name of The National Benefit Life Insurance Company as appellant in the Court of Appeals.

The affidavit of John T. Risher, dated April 6, 1939 (R. 473-4), annexed to said consent, sets forth that the affiant personally mailed on April 6, 1939, postage prepaid, his said letter to the said Clark and Bryan *to withdraw the appeal from the decree of Justice Gordon dissolving the said corporation.*

The said letter of the President of the defendant corporation to Clark and Bryan, sets forth, among other things (R. 474):

> "As President of The National Benefit Life Insurance Company, and pursuant to the authority given me by the Board of Directors of the Company, I employed Mr. Thurman L. Dodson to oppose on behalf of the Company, any effort which either you or your attorneys might make to appeal from the decree of Mr. Justice GORDON in the *Shaw-Walker* case, and I propose to set out just a few instances of outstanding injustices to demonstrate the reckless disregard of the rights of thousands of speechless policyholders and other creditors in the management of the affairs of the company by both of you as its receivers and the wasteful squandering of its assets."

The letter then sets forth the facts (R. 467-470) in detail, showing the gross mismanagement of the trust estate and the dissipation thereof by Receivers Clark and Bryan.

The President of the corporation also states in his letter (R.472):

> "The above matters are called to your attention solely for the purpose of indicating why I, as President of The National Benefit Life Insurance Company, think, that in justice and good conscience you should no longer resort to measures calculated to further defeat the efforts of the policyholders and other creditors of this company from reaching its assets and obtaining their share of the few crumbs which now remain.
>
> "You had your opportunity to work out the affairs of this company, having had it in your possession for nearly seven years.
>
> * * * * * *
>
> "The decree of Mr. Justice GORDON affords the only regular method of winding up the affairs of this company, which you had every opportunity to save, and having failed, *I hereby request you to instruct your Counsel to withdraw the name of The National Benefit Life Insurance Company as an appellant in this case and I think in all justice and fair play you should likewise instruct your Counsel to withdraw yourselves as appellants and permit justice to take its course.*" (Italics ours.)

XIX.

The Court of Appeals ordered (R.473) that appellees' motion to strike, to show cause, and to dismiss the appeal be set down for hearing at the time of argument on the appeal.

The motion was briefed and argued. It was overruled (R.513).

In the original opinion of Justice Rutledge, filed January 8, 1940 (R. 513), it was stated:

> "What we have said makes it unnecessary to

pass upon other questions presented by the record and by various motions which have been filed upon appeal. Most of them raise the basic jurisdictional question in some variant form.

"It is argued also that the Pinkett receivers may not prosecute this appeal because, it is said, they have not shown that they obtained leave of the appointing court. *Apart from the fact that they were authorized generally to take exclusive charge of the corporation's affairs and conduct its business, we consider this argument concluded by Palmer v. Morgan,* 45 App. D. C. 334, 341 (1916), *which held that the trial court's allowance of an appeal and approval of the appeal bond is sufficient permission.*" (Italics ours.)

In our motion for rehearing and reargument (R. 528) petitioners pointed out that Justice Rutledge was in error in deciding that your petitioners were concluded by the case of *Palmer v. Morgan,* 45 App. D. C. 334, 341 (1916), *supra,* for the reason that the transcript of the record in that case shows that the Receivers there obtained an order of the trial court authorizing them to appeal. *No such permission was obtained by Receivers Clark and Bryan.*

When your petitioners' motion for a rehearing and reargument was denied, without opinion, the reference to the *Palmer-Morgan* case, italicized above, was deleted from the opinion, and in lieu thereof a footnote (R. 513) was added, which sets forth that the order appointing Clark and Bryan gave them exclusive power to manage the corporation's affairs and enjoined all others from interfering with them.

XX.

The attention of this Honorable Court is particularly invited to Section IV (R. 514) of the opinion of Justice Rutledge, containing a discussion of the unusual handling of the trust estate by Receivers Clark and Bryan.

Among other things, Justice Rutledge says (R. 514):

"What has been said disposes of the present appeal. It is to be understood as limited specifically and solely to the two issues we have decided, namely, that the court had jurisdiction in the *Pinkett* case and that its discretion was exercised arbitrarily in appointing receivers in the instant case and holding that the receivership in the latter supersedes the receivership in the former. In so ruling we wish it to be clearly understood that we express no approval of the manner in which the Pinkett receivership has been conducted. As has been said, the record is replete with charges of misconduct against the Pinkett receivers as well as with assertions that the trial court repeatedly exceeded its jurisdiction in making particular orders in the course of the administration. Criticism has been directed especially toward its actions in permitting the receivers to carry on the 'modified' business and to make payments on matured policy claims while it was being conducted, in making allowances of fees to the receivers and their counsel, and in other respects. For reasons already stated, we make no decision concerning these matters. However, we cannot ignore entirely the fact that the record shows, through the temporary receiver's initial report, that the company's net worth was $2,396,749.29 when the Pinkett receivership was beginning and that now it is charged the assets have shrunk to less than $100,000, apparently without a liquidating dividend. * * *

"In our judgment much of the delay and confusion which has characterized the judicial administration of this company's affairs may be attributed to the haphazard system which has prevailed in the trial court for handling receivership matters. * * *

"At best it may be that the remedy of receivership is worse than the diseases it is applied to cure." * * *(R. 515).

STATEMENT AS TO JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, which provides:

> "In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

QUESTIONS PRESENTED.

The questions involved in this proceeding are:

1.

Whether the title to all property of an insolvent insurance company, incorporated and existing under the laws of the District of Columbia, vests in a receiver (as provided by sec. 397, Title 5, 1929 D. C. Code, set forth in appendix hereto) who was appointed in an original proceeding filed by a judgment-creditor of said insolvent creditor of said insolvent corporation for involuntary dissolution of the corporation, pursuant to secs. 416 and 409, Title 5, 1929 D. C. Code (set forth in appendix hereto) as against the asserted claims to the possession of said property of such corporation by two custodian or holding Receivers of the corporation who were previously appointed in an ordinary chancery suit which had been brought against said insolvent insurance corporation

for receivers to manage, operate and control, *pendente lite* and permanently, the life insurance business of said insolvent corporation (the value of whose capital stock was wiped out) in the District of Columbia and throughout the United States (the operation of such life insurance company being subject to civil penalties and criminal prosecution in this district, Secs. 171-174, incl., 176, 177, 179, 181, Title 5, 1929 D. C. Code, Transcript of Record, pp. 482-6). Three of the six Judges of the Court of Appeals of the District of Columbia decided that the custodian Receivers were entitled to hold the custody of the property of the corporation, and denied the right of title of the Receiver appointed in the statutory dissolution suit. Such decision fails to give proper effect to four decisions of this Court, and is in conflict with decisions of two Circuits Courts of Appeals, hereinafter cited in support of reasons for allowance of writ of certiorari.

The said four cases were quoted in brief of your petitioners (appellees) filed in the said Court of Appeals.

II.

Whether the three Judges of said Court of Appeals had jurisdiction to hold valid a decree of the trial court (Justice O'Donoghue), which appointed permanent receivers of a hopelessly insolvent District of Columbia life insurance corporation, doing business in the said district and in twenty-five states of the United States, to manage, operate and control said insurance company, in violation of statutes of said District regulating the conduct of life insurance companies, and by *ex parte* orders of the trial court, said permanent Receivers, under their plan, set up a separate "modified" life insurance business, entering into new "modified contracts" with 65,000 of a large number of the old or existing policyholders of the insolvent company, the Receivers using all of the assets of non-

consenting policyholders and other creditors, and collecting approximately one million dollars from the Receivers' contracts of insurance, which premiums, together with the major portion of the assets of the insolvent corporation, were dissipated by said Receivers in the promotion of their plan, during all the while the receivership itself was insolvent, and after the breach of all Receivers' contracts, the Receivers obtained an order of court to discontinue collection of premiums, and to liquidate all of the remaining tangible assets of the insolvent company.

III.

Whether custodian receivers of a District of Columbia insolvent corporation, who were not parties to a statutory proceeding properly brought by a judgment-creditor against said corporation, pursuant to statute, for a decree dissolving the corporation, in which the corporation was sole defendant and was duly served with process and a copy of the bill, and files no answer, but the custodian receivers file answer, opposing dissolution, and thereafterwards the attorneys for custodian receivers and for plaintiff enter into a written stipulation which conceded the correctness of the essential allegations of plaintiff's bill for dissolution, and after final hearing, a decree in favor of the plaintiff is entered granting the prayers of the bill, can appeal, without leave of Court, from said decree in the name of the corporation and themselves, and sign the name of the corporation to the appeal bond, without the authority of the corporation, as against a motion timely made by the appellee in the appellate court to dismiss the appeal, to which motion the corporation consents, advising the appellate court that the corporation did not desire to prosecute the appeal from the decree dissolving said corporation. Did the said Court of Appeals have jurisdiction to entertain the appeal by the custodian re-

ceivers, taken without any leave of court, and in opposition to the only defendant—the corporation?

IV.

Whether three Judges of the six Judges of the said Court of Appeals constituted a quorum for the hearing and disposition of this case, the remaining three Judges not participating therein, as against a motion timely filed by appellees and before oral argument, requesting that all of the members of the Court hear and decide the case, which motion was denied; and, whether, after the decree is reversed by the three Judges who heard the case, appellee timely filed a motion for rehearing or reargument before a full bench, which was denied, which included a denial for such rehearing or reargument; and whether the foregoing constitutes a violation of the due process clause of Article V of the amendments to the Federal Constitution, or whether it rested in the discretion of the Court of Appeals to assign this cause for hearing and decision by only three of the six Judges of the Court of Appeals.

V.

Whether, after counsel for the custodian Receivers by written stipulation with counsel for plaintiff stipulated as to the correctness of the essential allegations of plaintiff's bill for dissolution, and after stating to the trial court that plaintiff was entitled to a decree dissolving said corporation the said Receivers could appeal from the decree in favor of plaintiff.

VI.

Whether three Judges of the said Court had jurisdiction to entertain the appeal taken, without leave of court,

by the custodian Receivers, who were not parties in the dissolution suit, as against the timely motion of appellee to dismiss the appeal, to which motion the corporation filed its written consent in the Court of Appeals, advising the Court that it did not desire to prosecute the appeal.

VII.

The decree of Justice Gordon, holding District Court, dissolving the corporation, appointing a receiver, and decreeing that the trial court had no jurisdiction of the subject-matter of the case of *John Randolph Pinkett v. The National Benefit Life Insurance Co.* (Equity 53,391), and to appoint Clark and Bryan as permanent Receivers to operate, manage and control and carry on the business of the said insurance company, *in insolvency;* and that the opinion of the three Judges of the Court of Appeals reversing Judge Gordon was erroneous.

REASONS RELIED ON FOR ALLOWANCE OF A WRIT OF CERTIORARI.

I.

The opinion of the three Judges of the said Court of Appeals fails to give proper effect to eight decisions of this Court, applicable to this case.

Relfe v. Rundle, 103 U. S. 222.
Curran v. State of Arkansas, 15 Howard 304.
Bernheimer v. Converse, 206 U. S. 516, 534.
Converse v. Hamilton, 224 U. S. 243, 256.
International Insurance Co. v. Sherman, 262 U. S. 346.
National Surety Co. v. Coreill, 289 U. S. 426.
Lovell v. St. Louis Mutual Life Insurance Co., 111 U. S. 264.
Carr v. Hamilton, 129 U. S. 252.

The said opinion conflicts with two cases of two Circuits Courts of Appeals, namely:

Sterrett v. Second National Bank of Cincinnati, 246 Fed. 753 (CCA6), and
McConnell v. Hubbard, 272 Fed. 961 (CCA2), and

also with three decisions of the United States Court of Appeals for the District of Columbia, namely:

Johnston v. Davis, 56 App. Cas. D. C. 15, 16;
Richards v. Geiger, 39 App. Cas. D. C. 278; and
Rapeer v. Colpoys, 66 App. Cas. D. C. 216;

all of which are hereinafter referred to in the brief appended hereto.

II.

Whether custodian Receivers Clark and Bryan of The National Benefit Life Insurance Company, corporation (Equity 53,391), *had the implied authority, without leave of court,* to note and perfect an appeal to the United States Court of Appeals for the District of Columbia from a decree entered in the instant independent statutory proceeding entitled *The Shaw-Walker Company, corporation, v. The National Benefit Life Insurance Company, corporation,* as sole defendant (Equity 55,677), *in which latter proceeding said custodian Receivers were not parties,* and in which proceeding the corporation was dissolved, a receiver appointed and injunctive relief granted, and where the custodian Receivers (in the previous equity suit) took the appeal without authority of the corporation, or by its direction, as against a motion timely made in the appellate court by the appellee to dismiss the appeal, to which motion the corporation, by its counsel, filed a written consent in the appellate court consenting to the dismissal of the appeal and advising the Court that it did not desire to prosecute said appeal.

III.

Whether, in a statutory proceeding brought by a judgment-creditor of a District of Columbia insolvent life in-

surance corporation, for the involuntary dissolution of said corporation, pursuant to the provisions of the statutes of the District of Columbia, in which the corporation, sole defendant, is duly served with process and a copy of the bill, as required by the statute, and fails to file a corporate answer, but in which dissolution proceeding two custodian Receivers of said corporation, theretofore appointed in an ordinary equity suit, then pending (the bill of which latter suit prayed merely for the appointment of Receivers of the insolvent insurance corporation for the purpose of conducting its life insurance business in insolvency, in the District of Columbia and elsewhere throughout the United States the carrying on of such business by an insolvent corporation being in violation of the statutes of the District of Columbia) appeared, by said Receivers' counsel, and in the names of said custodian Receivers, assuming to act for the said insolvent corporation in the dissolution suit, filed answer therein, opposing dissolution, but thereafter, before final hearing, stipulated with counsel for the judgment-creditor-plaintiff in the dissolution suit, as to the correctness of the essential allegations of the bill for dissolution—can said custodian Receivers, *without leave of Court*, after final decree is entered dissolving said corporation, note, perfect, and maintain an appeal, in the names of the corporation and themselves, as custodian Receivers (the corporation itself not appealing) *against a motion timely made by appellee in the appellate court to dismiss the appeal on the ground that the defendant corporation (sole defendant) did not appeal, and the corporation, by its counsel, advises the appellate court that the corporation does not desire to prosecute the appeal and files written consent in the appellate court consenting to appellee's motion to dismiss the appeal.*

IV.

Whether three of the six Judges of the United States Court of Appeals for the District of Columbia constitute

a quorum for the hearing and disposition of cases appealed to that Court from the District Court of the United States for the District of Columbia and whether a decision by three of said Judges is a denial of the due process clause of Article V of the Amendments to the Constitution of the United States, where a written motion was timely filed by an appellee in a case in said appellate court, before the case is called for oral argument, requesting the right to appellee's counsel to present appellee's cause to the Chief Justice and the five Associate Justices of that Court, and said motion is denied, and where only three Judges of that Court sat, heard and decided the case, and, whether, after said three Judges filed their written opinion deciding the case (the other three Judges not participating therein) reversing the decree, appellee again timely filed its petition for rehearing or reargument before the full bench, which was denied, including denial of the said motion for rehearing or reargument, said denial is a violation of the due process clause of the Fifth Amendment to the Federal Constitution, or whether the denial to an appellee to present his cause to the full bench of said Court of Appeals is authorized by any statute, or rests within the discretion of the Court.

V.

Whether, in view of certain statutes in force in the District of Columbia, regulating the conduct of life insurance companies or associations in said District (Secs. 171, 172, 173, 174, 176, 177, 179, 181, Title 5, 1929 D. C. Code: see Transcript of Record, pp. 482-4) *prohibiting an insolvent life insurance company or association, or one which is impaired to the extent of twenty-five per centum of its capital stock, from carrying on a life insurance business* (Sec. 174, Title 5, 1929 D. C. Code: see Transcript of Record, pp. 483), and one violating

said statute is made liable for a penalty for each day's violation, and also to prosecution in the police court of this District, the United States Court of Appeals for the District of Columbia had jurisdiction to validate or affirm the decree of Justice O'Donoghue, holding the Supreme Court of the District of Columbia (now District Court of the United States for the District of Columbia) in the case entitled *John Randolph Pinkett, plaintiff, vs. The National Benefit Life Insurance Company,* corporation (Equity 53,391), in which respondents herein, Gilbert A. Clark and Frank B. Bryan, Jr., were appointed Receivers of said insolvent corporation, with authority and direction to carry on the life insurance business of the said insolvent corporation, in the District of Columbia, and elsewhere throughout the United States, which the said receivership did when the said receivership itself was insolvent, and when said permanent Receivers never even had a license.

VI.

Whether the United States Court of Appeals for the District of Columbia had jurisdiction to entertain the appeal of respondents Clark and Bryan when their counsel stipulated in the trial court as to the correctness of the essential allegations of the bill of complaint of plaintiff (petitioner The Shaw-Walker Company herein) for the dissolution of said defendant corporation, and stated to the trial court that plaintiff was entitled to decree dissolving the corporation.

VII.

Justice Gordon, holding District Court, had jurisdiction to enter the final decree dissolving defendant corporation, appointing a receiver, and awarding injunctive relief, based upon his finding of facts, conclusions of

law, the evidence, and the stipulation between counsel for the plaintiff and counsel for Receivers Clark and Bryan, and also to decree that the Pinkett proceedings were void for lack of jurisdiction of the Court of the subject-matter of that suit, and that the appointment of Clark and Bryan as permanent Receivers to operate the insolvent defendant insurance company, *in insolvency.* If the three of the six Judges of the United States Court of Appeals had jurisdiction, which is denied, to entertain the appeal of Receivers Clark and Bryan, then their opinion reversing the decree of Justice Gordon is erroneous.

Wherefore, petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Court of Appeals for the District of Columbia, commanding said Court to certify and send to this Court a transcript of the record and of all proceedings in this cause, to the end that said cause may be reviewed and determined by this Court; that the judgment and decree of Justice Rutledge, concurred in by Chief Justice Groner and Justice Stephens of the said Court of Appeals be reversed, and that petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and proper.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. .....

THE SHAW-WALKER COMPANY, a corporation; and ROBERT B. HILLYARD and WALTER S. HILLYARD, doing business as Shine-All Sales Company, and LEAH B. WILSON,
Petitioners,

vs.

THE NATIONAL BENEFIT LIFE INSURANCE COMPANY, a corporation; and GILBERT A. CLARK and FRANK B. BRYAN, Jr., Receivers of The National Benefit Life Insurance Company, a corporation (appointed in Equity Cause No. 53,391),
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF JUSTICE RUTLEDGE, CONCURRED IN BY CHIEF JUSTICE GRONER AND ASSOCIATE JUSTICE STEPHENS, THREE OF THE MEMBERS OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

The opinion of the three above named Judges of the United States Court of Appeals for the District of Columbia (the other three Judges of the Court did not sit or participate in the hearing and disposition of this cause, although petitioners requested a hearing before a full bench, which was denied) is not yet officially reported, but the same is contained in the transcript of the record at pages 500-515. It was published in advance sheets, issue June 17, 1940, of the Federal Reporter (2d), at pages 497-510, and will be reported in 111 Fed. (2d), 426-434. It was also published in 68 Washington Law Reporter, 426-434.

The opinion of Justice Gordon, holding District Court, who decided the instant statutory dissolution suit (Equity 55,677), holding that the plaintiff (petitioner The Shaw-Walker Company) was entitled to a decree dissolving the defendant corporation (respondent Insurance Company), appointing receiver, granting injunctive relief, and decreeing that the Supreme Court of the District of Columbia (now District Court), Justice O'Donoghue presiding, had no jurisdiction of the subject-matter and that the appointment of Receivers Clark and Bryan, Jr., in the case of *John Randolph Pinkett v. The National Benefit Life Insurance Company,* corporation (Equity 53,391) was void, is contained in the transcript of record at pages 106-117, and is also published in 67 Washington Law Reporter, 125-128, issue, February 10, 1939. See his finding of facts (R. 118-129) and conclusions of law (R. 129-130).

The opinion of Justice O'Donoghue, in the *Pinkett* case, is contained in the transcript of record at pages 154-157. *He made no finding of facts or conclusions of law.*

II.

JURISDICTION.

The petition (*ante*, pp. 1-26) states the grounds on which the jurisdiction of this Court is invoked, to which reference is hereby respectfully asked.

III.

STATEMENT OF THE CASE.

A statement of facts and the status of the case are set forth in the accompanying petition at pages 27-35.

Repetition is not made here, but reference thereto is also respectfully asked.

IV.

SPECIFICATIONS OF ERRORS.

The United States Court of Appeals for the District of Columbia erred as follows:

(1) In overruling the timely motion of petitioners herein (appellees in the Court of Appeals) to dismiss the appeal taken by the custodian Receivers Clark and Bryan, Jr., which motion was consented to by said corporation.

(2) In holding that custodian Receivers Clark and Bryan, Jr., of the defendant insurance company, who were not parties to the instant statutory dissolution proceeding against said corporation (Equity 55,677), had the implied power, without leave of the Court, and without the authority or direction of the corporation, to note and perfect, in the names of said custodian Receivers and said corporation, an appeal to the United States Court

of Appeals for the District of Columbia from the decree of the District Court, dissolving said corporation in the case of *The Shaw-Walker Company, corporation, v. The National Benefit Life Insurance Company,* as sole defendant (Equity 55,677), as against a timely motion of the petitioners herein (appellees in said Appellate Court) to dismiss said appeal, to which motion the corporation, by its counsel, consented advising the Appellate Court that the said corporation did not desire to prosecute an appeal from the said decree dissolving said corporation.

(3) In denying petitioners the right under the due process clause of the Fifth Amendment to the Federal Constitution to have their cause heard and decided by a duly constituted Court of six Judges, rather than by three of the six Judges of the said Court; and in denying the motions timely made by petitioners in said Appellate Court for a hearing and/or rehearing before all of the Judges of said Court.

(4) In assigning only three Judges of said Court to hear and decide this case as against the several motions of petitioners (appellees) requesting that a full bench sit and decide the case.

(5) The opinion of Justice Rutledge, concurred in by Chief Justice Groner and Justice Stephens, contains the following errors:

(a) In failing to give proper effect to applicable decisions of this Court, namely:

Relfe v. Rundle, 103 U. S. 222.
Curran v. The State of Arkansas, 15 Howard 304.
Bernheimer v. Converse, 206 U. S. 516, 534.
Converse v. Hamilton, 224 U. S. 243, 256.
International Ins. Co. v. Sherman, 262 U. S. 346.
National Surety Co. v. Coreill, 289 U. S. 426.
Lovell v. St. Louis Mutual Life Insurance Co., 111 U. S. 264.
Carr v. Hamilton, 129 U. S. 252.

(b) In holding that the custody of receivers, appointed by decree of an equity court in an ordinary simple contract creditor's suit, of the property of an insolvent domestic corporation, is higher than the title to and right to possession of the property of such corporation of a statutory receiver of said corporation, appointed in a suit brought by a judgment-creditor against said corporation, pursuant to the provisions of a statute, to dissolve said corporation; and the said three Judges erred in not holding that the title and the right to possession of the assets of the corporation of the said statutory receiver are paramount to the possession of the equity custodian Receivers.

(c) In failing to hold that the right of creditors became fixed as of the date when a statutory proceeding is filed for the dissolution of an insolvent domestic corporation, and when the decree is entered decreeing that said corporation should be dissolved, a receiver of the corporation is appointed, the title of such statutory receiver and his right to possession of all of the assets of the insolvent corporation are paramount to the possession by mere custodian receivers of the corporation, who were appointed in a simple contract creditor's suit; and in failing to hold that the statutory dissolution proceeding, when final decree is entered dissolving the corporation, supersedes the existing simple contract creditor's suit.

(d) In deciding that Justice O'Donoghue (holding the Supreme Court of the District of Columbia, now District Court) had jurisdiction to enter decrees dated February 29, 1932, and April 8, 1932, respectively, and other decrees, in the case of *John Randolph Pinkett v. The National Benefit Life Insurance Co.,* corporation (Equity 53,391), appointing Clark and Bryan, Jr., permanent receivers of said corporation, and authorizing and direct-

ing them to carry on the life insurance business of said Insurance Company, *in insolvency,* in the District of Columbia, and elsewhere throughout the United States, and to modify contracts of life insurance with existing policyholders of said insolvent insurance company, and also when said receivership itself was insolvent, and as against the rights and interests of non-assenting policyholders and other creditors of the insolvent company, the Receivers using the assets of the insolvent company to carry on said life insurance business.

(e) In not holding that the proceedings in the aforesaid *Pinkett* case were void for lack of jurisdiction of the Court of the subject-matter of the *Pinkett* bill of complaint (Equity 53,391).

(f) In reversing the decree of Justice Gordon (holding District Court) in this statutory proceeding (Equity 55,677), dissolving said Insurance Company, appointing a receiver thereof, awarding injunctive relief against Clark and Bryan, Jr., receivers in the *Pinkett* case, and decreeing that the proceedings in the *Pinkett* case (Equity 53,391) were void.

V.

SUMMARY OF ARGUMENT.

1. The said Court of Appeals should have granted motion of petitioners (appellees) to dismiss the appeal.

2. A hearing and a decision by only three of the six Judges of the said Court of Appeals as against a timely motion for hearing before a full bench, is not a hearing and decision of that Court, but a nullity. Less than a majority of said Court is not a quorum.

3. The opinion of the three Judges (the other three

Judges of the Court did not sit or participate in the hearing or decision) fails to give proper effect to eight decisions of this Court, applicable to the instant case, heretofore and hereinafter cited. It conflicts with two decisions of other Circuit Courts of Appeals, and with three decisions of the said United States Court of Appeals for the District of Columbia, heretofore and hereinafter referred to.

4. The title of a receiver of an insolvent domestic corporation, appointed in a statutory dissolution suit, brought by a judgment-creditor against the corporation, as sole defendant, to all of the property of the corporation, is paramount to the possession of the property of such corporation of two receivers appointed in a simple contract creditor's suit against the corporation.

5. The rights of creditors in a statutory suit for the dissolution of a corporation become fixed as of the date of the filing of the bill, and when decree is entered dissolving the corporation such decree supersedes the pending equity receivership case previously brought by a simple contract creditor.

6. A court of equity is without jurisdiction, in a simple contract creditor's suit brought against a hopelessly insolvent life insurance company incorporated under the laws of the District of Columbia, to enter decree appointing receivers of the corporation with authority and direction to operate, manage and control the life insurance business of the insolvent corporation in the District of Columbia and elsewhere throughout the United States, or to conduct a life insurance business, in insolvency. Such decrees are void.

VI.

ARGUMENT.

1.

THE SAID COURT OF APPEALS SHOULD HAVE GRANTED THE MOTION OF PETITIONERS (APPELLEES), TO DISMISS THE APPEAL FOR THE FOLLOWING REASONS:

(a) Because the corporation, although served with process in this dissolution suit, did not file a corporate answer and oppose a decree of dissolution;

(b) Because the custodian Receivers, who appeared in said dissolution suit, stipulated, by their counsel, with counsel for plaintiff, as to the correctness of the essential allegations of the bill (R. 19-22).

(c) Because at the final hearing, said custodian Receivers, by their counsel, in open court, conceded that the plaintiff was entitled to a decree of dissolution of the corporation (R. 37, 80).

(d) Because the corporation, or its counsel, did not note an appeal or sign the appeal bond (R. 210), or authorize the custodian Receivers, who were not parties to the dissolution suit, to note an appeal in its behalf.

(e) Because the custodian Receivers did not obtain an order of court, either in the dissolution suit or in the equity suit in which said custodian Receivers had been appointed, granting leave, or instructing said Receivers to appeal from the dissolution decree.

(f) Because when the appeal was docketed in the United States Court of Appeals for the District of Columbia, the petitioners herein (appellees) filed (R.

425-430) a timely motion in said Appellate Court to dismiss the appeal, to which motion the corporation, by its counsel entered special appearance (R. 438) and consented to said motion, advising the Court that the corporation did not desire to prosecute the appeal (R. 462-3); and

(g) Because the President of the corporation, after the custodian Receivers caused said appeal to be docketed in the Appellate Court, wrote a letter to the Receivers advising that said corporation did not desire to prosecute said appeal and directing them to abandon the same (R. 472).

The legal existence of a corporation is not cut short by its insolvency and the consequent appointment of a Receiver. *Chemical National Bank v. Hartford Deposit Co.*, 161 U. S. 1, 7, 8, 9. A decree appointing a Receiver for a corporation will not work its dissolution, *Coy v. Title Co.*, 313 Fed. 595, affirmed, 320 Fed. 90.

Neither the insolvency of a corporation nor the circumstances which usually attend an insolvency, such as the appointment of a Receiver, will work a dissolution of the corporation, so as to disable it from exercising its corporate powers. *Pondville Co. v. Clark*, 25 Conn. 97.

In *Brown v. Delafield and Baxter Cement Co.*, 1 App. Cas. D. C. 232, the Court says that "The authorities are practically unanimous to the effect that a corporation does not lose its franchise or become legally dissolved by discontinuing its business, ceasing to maintain an office or to elect officers, or by becoming hopelessly insolvent."

Notwithstanding the appointment of a Receiver, the corporate identity is preserved, *Bethel Natl. Bk. v. Pahquioque Natl. Bk.*, 14 Wallace, 383, until its dissolution is effected by the termination of its existence in law or

in fact. The appointment of a Receiver of a corporation does not involve a consideration of any question whatever which might arise in a suit instituted directly for the purpose of dissolving the corporation. *Kincaid v. Dwinnelle,* 37 N. Y. Super. Ct. 326, 331, affirmed 59 N. Y. 548.

CUSTODIAN RECEIVERS, NOT PARTIES TO SUIT, COULD NOT APPEAL.

Where a party appealing was not a party to a suit, nor does it appear that he ever asked to be made a party, his application for an appeal will be denied. *Ex parte Cockcroft,* 104 U. S. 578.

No persons but those appearing to be parties *on the record* can be permitted to be heard on an appeal or writ of error, *Harrison v. Nixon,* 9 Peters 483, 484; *Elwell v. Fosdick,* 134 U. S. 500; *Connellsville etc. R. Co. v. Baltimore,* 154 U. S. 553.

It is a well settled maxim of the law that "no persons can bring a writ of error to reverse a judgment who is not a party or privy to the record." A writ of error lies when a man is grieved by an error in the foundation, proceeding, judgment, or execution in suit. *Boyle v. Zacharie,* 6 Peters 655; *Bayard v. Lombard,* 9 How. 536.

In ejectment, the tenant in possession having neglected to appear and have herself made a defendant in the Court below cannot have a writ of error to the judgment against the casual ejector. *Connor v. Peugh,* 18 How. 374.

And it is well settled that no one can bring up as plaintiff in a writ of error the judgment of an inferior court to a superior one unless he was a party to the judgment in the Court below; nor can anyone be made a defendant in a writ of error who was not a party to the judgment in the inferior court. *Payne v. Niles,* 20 How. 219.

Where in a suit for the foreclosure of a mortgage, the mortgagee is satisfied with the decree as entered, the mortgagor cannot appeal from the decree of foreclosure. *Indiana Southern Ry. Co. v. Liverpool, etc., Ins. Co.*, 109 U. S. 168.

The decree in the instant statutory proceeding being for the dissolution of the defendant corporation, Clark and Bryan have no legal or equitable interest in the controversy. In *Basket v. Hassel*, 107 U. S. 602, the Court held that persons who have no legal interest, either in maintaining or reversing a decree, are not necessary parties to the appeal. See, also, *Cox v. United States*, 6 Peters 181, 182; *Germaine v. Mason*, 12 Wall. 259, 261; *Simpson v. Greely*, 20 Wall 152.

An appeal by an administrator *de bonis non* is irregular unless he is first made a party in the Court below, either upon his own application or that of the complainants according to the rules and practice in chancery proceedings. *Taylor v. Savage*, 1 Howard 282.

The suing out of a writ of error is the beginning of a new suit. *Sholty v. McIntyre*, 139 Ill. 171.

In *State ex rel. Cassedy v. Interstate Fisheries Co.*, 78 Pac. (Wash.) 202, the Court held that a receiver, removed, had no right of appeal, no matter how much the receiver may have felt aggrieved at the action of the Court in removing him. The Court said: "But whether he personally shall or shall not continue as receiver is a question he has no right to litigate."

In the following cases the receivers were denied the right of appeal: *Coffey v. Gay*, 67 So. (Ala.) 681; *McKinnon v. Wolfenden*, 47 N. W. (Wis.) 436; *Cobbs, Receiver v. Vizand, Inc.*, 62 Ala. 730; *Chicago Tile Co. v. Caldwell*, 58 Ill. 219.

In *Screven v. Clark*, 48 Ga. 41, the Court said that the foundation of the rule is that it is always for the Court itself to determine whether it shall be "dragged into litigation."

In *Louisville & St. L. Consolidated R. R. Co. v. Surwald,* 37 N. E. 909, it was held that as a general rule the writ of error should be sued out in the same names in which the proceeding in the Circuit Court was conducted; that although there had been a consolidation of the party of record with the one seeking to appeal, the right of appeal was denied.

A third person cannot take an appeal in the name of the party to the decision merely because it may affect his interest adversely. *Colman v. West Va. Coal Co.,* 25 W. Va. 148; *McIntyre v. Sholty,* 143 Ill. 17.

In *ex parte Dorr,* 3 Howard, 104, the Court held that a writ of error cannot be prosecuted at the instance of next friend for the benefit of a party to the record without his consent.

In *Irwin v. Armuth,* 129 Ind. 340, the Court held that a mere *amicus curiae* appearing in the trial court proceeding cannot appeal from any decision in the case, even though the trial court may have allowed him to introduce evidence for his own benefit. See, also, *Martin v. Tayley,* 119 Mass. 116.

In *Dalbkermeyer v. Scholtes,* 3 S. D. 124, the Court held that "an appeal will be dismissed when it is shown by satisfactory evidence that it was or is being prosecuted without authority, and against the desire or wish of the appellant."

Creditors of an unsuccessful party cannot appeal from the judgment against them. *Sherrer v. Collins,* 17 N. J. L. 181; *Clapp v. Ely,* 27 N. J. L. 555; *Evans v. Adams,* 15 N. J. L. 373. If Clark and Bryan, receivers, claim that they represent creditors of the defendant corporation, administering the affairs of that company in the *Pinkett* case, and that they have been superseded in the instant dissolution suit by another receiver, said Clark and Bryan have no right of appeal in this case.

A receiver cannot appeal from an order removing him unless he is a party to the action in

which he was appointed. *Connor v. Belden,* 8 Daly (N. Y.) 257. A receiver has no right of appeal from an order of Court removing him from office, for that is a matter of discretion with the Court appointing him, and he holds his position by the sufferance of the Court. *Miller v. Lehman,* 87 Ala. 517; *Milwaukee v. R. R. Co.,* 131 U. S. Appendix lxxxi; *Parson v. Gotham,* 177 Ill. 137; *Detroit First Natl. Bk. v. E. T. Barnum Wire, etc., Works,* 60 Mich. 487; *Matter of Colvin,* 3 Md. Ch. 302.

A receiver cannot appeal from a judgment establishing rights of creditors with regard to each other, as the estate is not thereby aggrieved. *Ross v. Wigg,* 100 N. Y. 243; *Chicago Title, etc., Co. v. Caldwell,* 58 Ill. App. 219.

Custodian receivers, having conceded in the trial court (R. 37, 80), right of plaintiff to decree of dissolution, they could not appeal. *U. S. v. Babbitt,* 104 U. S. 767; *Ganss v. Goldenberg,* 39 App. Cas. D. C. 597.

2.

PETITIONERS, PRIOR TO THE ORDER OF COURT SETTING THIS CASE DOWN FOR ARGUMENT, FILED A MOTION REQUESTING THAT THE HEARING BE HAD BEFORE THE CHIEF JUSTICE AND THE FIVE ASSOCIATE JUSTICES (R. 475). THIS MOTION WAS DENIED (R. 476).

The cause was argued and decided by three judges.

When the opinion was filed, petitioners timely filed a motion for rehearing or reargument before the full bench (R. 522), which was denied, including denial of the motion for rehearing or reargument.

A hearing and decision by only three of the six judges against the timely motion for hearing before a full bench

is not a hearing and decision by the Court, but a nulity. Less than a majority of said Court is not a quorum.

The act of February 9, 1893 (27 Stat. 434), establishing the Court of Appeals for the District of Columbia, provided that it should consist of one chief justice and two associate justices, and that in the absence or disqualification of any member thereof, or for any other reason it might be impracticable to obtain a full Court of three justices, a justice or justices of the Supreme Court of the District of Columbia should be designated to fill the vacancy or vacancies temporarily, and that the parties to any cause might stipulate in writing that such cause might be heard by two justices of said Court.

From time to time the membership of the Court of Appeals has been increased by acts of Congress, but no other changes has been made in the organic statute. No one of the later acts has provided that the Court might function by a quorum of less than all the justices.

In this respect it is significant to compare the statutes relating to the Supreme Court of the United States with those relating to the said Court of Appeals. The act of April 10, 1869 (Sec. 673 R. S.) provides that:

> "The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum."

Similarly, the statute (Sec. 243 U. S. Code), relating to the United States Court of Claims, which consists of a chief justice and four associate justices, provides that:

> "The concurrence of three judges shall be necessary to the decision of any case."

Section 301, U. S. Code, which established the Court of Customs and Patent Appeals, provides that:

> "Any three members of said court shall constitute a quorum, and the concurrence of three

> members shall be necessary to any decision thereof. * * *"

From a review of these enactments, it appears that it is the legislative policy of this country with respect to Federal Courts to provide specifically for a quorum in any given court of less than its entire membership, or to provide that a lesser number than all the members may concur in the decision in any given case, but where no such provision is made in the statute, it is submitted that the Court has no power or authority to decide cases or to transact business by less than the full number of its members.

It would follow, therefore, that if Congress desired that the Court of Appeals for the District of Columbia should function by three members in any particular case, or in all cases, a provision to that effect would have been incorporated in the organic statute, or some later enactment. If that Court can function by three members, why may it not function by one member, and thus divide itself into six separate parts, each hearing cases at the same time?

Petitioners contend that a decision by three of the six members of the Court below is not a decision of that Court, and that a hearing before three of such members is a hearing before an illegally constituted Court, by which petitioners' constitutional right of due process of law under the Fifth Amendment to the Constitution was denied.

It is believed that this Court had in mind such a situation when it used the following language in *Pennoyer v. Neff*, 95 U. S. 714, 733, in reference to due process of law:

> "* * * They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforce-

> ment of private rights. To give such proceedings any validity, *there must be a tribunal competent by its constitution*—that is, by the law of its creation—to pass upon the subject-matter of the suit. * * * (Italics ours.)

Where less than a majority of the members of a court hear a cause, a decree "by the court" has been held to be improper. *Ebling v. Schuylkill Haven,* 244 Pa. 505, 91 A. 360. See also *Brown Drug Co. v. U. S.,* 235 Fed. 603; *Calhoun v. Seattle,* 215 Fed. 226.

Where a ruling on appeal is by two of three justices only, it is not binding as an authority. *Gilbert v. State,* 116 Ga. 819, 43 S. E. 47.

We conclude, therefore, that a decision by three of six Judges not only is not binding as an authority, but is not a decision of the Court below and is not of any value as a precedent.

3.

The opinion of the said three judges fails to give proper effect to eight decisions of this Court, and conflicts with two cases of two Circuit Courts of Appeals, and three cases of the United States Court of Appeals for the District of Columbia.

Relfe v. Rundle, 103 U. S. 222, and *Curran v. The State of Arkansas,* 15 Howard, 304 (in view of sec. 397, title 5, 1929 D. C. Code, set forth in appendix hereto, which vests title in a receiver to all property of an insolvent domestic corporation in a statutory dissolution suit), and also the cases of *Bernheimer v. Converse,* 206 U. S. 516, 534, and *Converse v. Hamilton,* 224 U. S. 243, 256, holding that the title of a statutory receiver in a dissolution suit is paramount to the possession and custody of a mere chancery receiver, who is but the officer

of the court appointing him, and that the title of the statutory receiver is recognized in foreign jurisdictions.

International Ins. Co. v. Sherman, 262 U. S. 346, holding a decree void, which sets up a plan to bar and estop certificate holders of an insolvent insurance company, not parties to the suit, that attempted to bar them and cancel their certificates who failed to avail themselves within twenty days to pay a certain amount on each certificate, surrender their certificates for cancellation and receive stock in a reorganized company.

National Surety Co. v. Coreill, 289 U. S. 426, holding that it was improper in a receivership case to pass upon the wisdom of a plan for reorganization and the rights of non-assenting creditors, without definite, detailed and authentic information.

By force of the last two cited cases, the *ex parte* order of the Court, dated April 8, 1932, in the *Pinkett* case, whereby Receivers Clark and Bryan were authorized and directed to enter into modified contracts of insurance for indefinite periods, was in excess of the jurisdiction of the Court, certainly as to non-assenting creditors (of whom petitioner The Shaw-Walker Company was one) and policyholders, who are, of course, creditors also.

The said *ex parte* order of April 8, 1932, conflicts with the principle decided in the case of *Lovell v. St. Louis Mutual Life Ins. Co.,* 111 U. S. 264, holding that on the termination of its business by a life insurance company, and the transfer of its assets to another company, each policyholder may, if he desires, terminate his policy and maintain action to recover from the assets such sum as he may be equitably entitled thereto. The Pinkett Receivers used the assets of non-consenting creditors (of whom The Shaw-Walker Company was one) and other creditors, including non-consenting creditor-policyholders,

as well as approximately one million dollars ($1,000,000), collected by them during the seventeen months of their "insurance business" from about 65,000 of the total number of policyholders who modified their contracts of insurance with said Receivers, in the promotion of the insurance plan of the Receivership, which was itself insolvent, and nearly all of the assets, including the said premiums, were utilized for administrative expenses, counsel fees and other expenses in connection with the Receivers' said insurance business.

The said opinion conflicts with *Carr v. Hamilton,* 129 U. S. 252, holding that by the act of the insolvency of a life insurance company, the company becomes *civiliter mortuus,* its business is brought to an absolute end, and the policyholders become creditors to an amount equal to the equitable value of their respective policies, and entitled to participate pro rata in its assets.

The said opinion of the three Judges of said Court of Appeals conflicts with the cases of *Sterrett v. Second National Bank of Cincinnati,* 246 Fed. 753 (CCA6), and *McConnell v. Hubbard,* 272 Fed. 961 (CCA2), which held that receivers appointed by virtue of statutes providing for dissolution or winding up of corporations are vested with title to all of the property of the corporation, and that the rights of such statutory receivers or quasi-assignees are paramount to chancery receivers who derive their authority from orders of Courts appointing them.

The opinion of the three Judges of the said Court of Appeals conflicts with three decisions of said Court of Appeals, (1) *Johnston v. Davis,* 56 App. Cas. D. C. 15, 16, holding that the rights of creditors become fixed as of the date when an action for dissolution of a domestic corporation is filed. (In the instant case, the petition of your petitioner, The Shaw-Walker Company for dissolution of the said insurance company, was filed May 12,

1933.) Said opinion conflicts with (2) *Richards v. Geiger,* 39 App. Cas. D. C. 278, holding that an order of the Probate Court of the District Court was void which authorized executors to continue the operation of barroom in this District without obtaining a license from the Excise Board, in whom the authority and power were vested by act of Congress to grant or refuse to grant such license. In the instant case, the equity court authorized and directed Receivers Clark and Bryan to operate an insolvent life insurance business in violation of local statutes, without a license from the local insurance department.

Said opinion conflicts with the case of (3) *Rapeer v. Colpoys,* 66 App. Cas. D. C. 216, which held that a decree which transcends limitation on Court's fundamental power in civil or criminal cases is void. The equity court which entertained the *Pinkett* suit, appointing Receivers to operate an insolvent life insurance business, even without a license, violated the statutes of the District of Columbia.

4.

THE TITLE OF A RECEIVER OF AN INSOLVENT DOMESTIC CORPORATION, APPOINTED IN A STATUTORY DISSOLUTION SUIT, BROUGHT BY A JUDGMENT-CREDITOR AGAINST THE CORPORATION, AS SOLE DEFENDANT, TO ALL OF THE PROPERTY OF THE CORPORATION, IS PARAMOUNT TO THE MERE POSSESSION OF THE PROPERTY OF SUCH CORPORATION BY RECEIVERS PREVIOUSLY APPOINTED IN A SIMPLE CONTRACT CREDITOR'S SUIT AGAINST THE CORPORATION.

In support of the above proposition, we cite:

Secs. 416, 409, 397, title 5, 1929 D. C. Code, set forth in appendix hereto.

Relfe v. Rundle, 103 U. S. 222.
Curran v. The State of Arkansas, 15 Howard 304.
People v. N. Y. City Ry. Co., 107, N. Y. Supp. 247.
Wilmer v. Atlantic and Richmond Airline Co., 2 Woods, 426, Fed. Cas. No. 17,776.
Sterrett v. Second Natl. Bk. of Cincinnati, 246 Fed. 753 (CCA6).
McConnell v. Hubbard, 272 Fed. 961 (CCA2).
Converse, Receiver, v. Hamilton, 224 U. S. 243, 256-7.
Bernheimer v. Converse, 206 U. S. 516, 534.

5.

THE RIGHTS OF CREDITORS IN A STATUTORY SUIT FOR THE DISSOLUTION OF A CORPORATION BECOME FIXED AS OF THE DATE OF THE FILING OF THE BILL, AND WHEN DECREE IS PASSED DISSOLVING THE CORPORATION SUCH DECREE SUPERSEDES PENDING EQUITY RECEIVERSHIP CASE BROUGHT PREVIOUSLY BY A SIMPLE CONTRACT CREDITOR.

We refer to the cases cited in No. 4, hereinabove, and also:

People v. N. Y. City Ry. Co., 107 N. Y. Supp. 247.
People v. Commercial Alliance Life Insurance Co., 154 N. Y. 95, and
Johnston v. Davis, 56 App. D. C. 15, 16.

6.

The three Judges of the Court of Appeals had no jurisdiction to hold valid the decree of Justice O'Donoghue, in the case of *John Randolph Pinkett v. The National Benefit Life Insurance Co.* (Equity 53,391), which authorized and directed the Receivers of the insolvent defendant insurance company, doing business in the Dis-

trict of Columbia and in twenty-five states of the United States, to manage, operate and control said insurance company, *in insolvency,* because the same was in violation of statutes of the District of Columbia regulating the conduct of life insurance companies, which provide recovery of penalties and for prosecution in the police court against a company or association carrying on life insurance business when such company is insolvent, or when its capital stock is impaired to the extent of 25 per cent (see secs. 171-174 176-177, 179, 181, set forth in transcript of record on pages (482-4).

See case of *Richards v. Geiger,* 39 App. Cas. D. C. 278, 284, in which the Court held void an order of the Probate Court of this District, which authorized an executor to continue to operate a barroom business without having obtained a license from the Excise Board.

See also *Rapeer v. Colpoys,* 66 App. Cas. D. C. 218, in which the Court held that a decree which transcends a limitation upon the Court's fundamental power is void.

The three Judges of the Court of Appeals, who decided the instant case, exceeded their power in holding valid the exercise of jurisdiction by Justice O'Donoghue, who, by his decrees in the *Pinkett* case, authorized and directed Receivers Clark and Bryan to "modify" life insurance contracts of the defendant corporation, *in insolvency,* and when the receivership itself was insolvent, and as against the rights and interests of non-assenting policyholders, and other creditors of the insolvent defendant corporation.

VII.

CONCLUSION.

We respectfully submit that this case presents important public questions of general law for determination by this Honorable Court, and it is prayed that the writ of certiorari should issue herein.

Respectfully submitted,

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APPENDIX.

In Chap. 13, Code of Laws (1929) of the District of Columbia, Title 5, "Corporations" are contained the following sections:

"409. Involuntary dissolution at the suit of the United States.—Whenever the district attorney of the United States for the District of Columbia shall become satisfied that any corporation organized under the laws of said District has been guilty of such misuse, abuse, or nonuser of its corporate powers and franchises, or such violation of law as would authorize and make proper the forfeiture of its charter, corporate powers, and franchises, the said district attorney shall file in the Supreme Court of the District a petition in the name of the United States, setting forth, fully and in detail, the alleged abuse, misuse, or nonuser by reason whereof such forfeiture is sought, which petition shall be supported by affidavits of credible persons; and upon the filing of such petition the said court shall lay a rule requiring such defendant corporation to show cause, within such time as the court may deem proper, why a decree should not issue as prayed in said petition, a copy of which rule and petition shall be served on said corporation by a day therein limited. (Mar. 3, 1901, 31 Stat. 1319, c. 854, sec. 786)."

"410. Same; answer of corporation.—The said corporation, by the day named in said order, unless further time be granted by the court, shall file an answer to said petition, fully setting forth all the defenses upon which it intends to rely in resisting the application, which shall be verified by affidavit of some officer of the corporation. (Mar. 3, 1901, 31 Stat. 1319, c. 854, sec. 787)."

"411. Same; pleading.—The petitioners may thereupon plead to or traverse all or any of the material averments set forth in the answer, and the defendant shall join issue with or demur to

said plea or traverse within five days thereafter. (Mar. 3, 1901, 31 Stat. 1319, c. 854, sec. 788)."

"412. Same; trial.—If issue or issues be joined on such proceedings, the same shall stand for trial at such time as the court shall direct and shall be tried by a jury if either party desire it; otherwise, they shall be heard and determined by the court. If, from the findings of the jury or upon consideration and determination of the case by the court, the court shall be of opinion that legal cause of forfeiture has been shown and the public interests require that said forfeiture shall be declared, a decree of forfeiture shall be entered and the charter of said corporation shall thereby be annulled and vacated and its corporate franchises and powers shall cease and be void; and the court shall thereupon appoint a receiver or receivers of the assets and estate of said corporation, who shall proceed to wind up the affairs of said corporation, for the benefit of its creditors and stockholders, under the direction of the court. (Mar. 3, 1901, 31 Stat. 1319, c. 854, sec. 789)."

"413. Same; *ex parte* proceeding after default in pleading.—If any corporation upon which a petition and rule to show cause shall have been served as aforesaid, shall neglect to file an answer thereto at the time appointed by the court, the court shall proceed to hear the application *ex parte* within five days thereafter, and if it shall be of opinion that good cause of forfeiture is shown it shall proceed to decree as provided in section 412 of this title. (Mar. 3, 1901, 31 Stat. 1320, c. 854, sec. 790)."

"414. Same; judgment.—If the court, either upon a hearing *ex parte* or after answer shall be of opinion that no cause of forfeiture is shown or that the public interests do not demand that such forfeiture be decreed, though legal cause therefor has been shown, it shall dismiss the petition. And if the court shall determine that legal cause of for-

feiture has been shown, it may, in its discretion, before passing a final decree of forfeiture, pass orders requiring the said corporation, within a time to be therein fixed, to remedy the grievance complained of, and may suspend the passage of the final decree of forfeiture until the time so fixed, and may afterwards refuse to pass such decree if the grievance shall have been remedied by the time so fixed. (Mar. 3, 1901, 31 Stat. 1320, c. 854, sec. 791)."

"415. Same; injunction against assuming corporate franchise or transacting business not authorized by charter.—The district attorney may file a bill in the name of the United States in said supreme court for the purpose of restraining by injunction any corporation organized under the laws of the District from assuming or exercising any franchise, liberty, or privilege or transacting any business not allowed by its charter or certificate of incorporation or not by law allowed to be assumed or exercised by said corporation, and said district attorney may file a bill to enjoin any foreign corporation from transacting in the District of Columbia any business not allowed by its charter or certificate of incorporation, or from transacting any business in said District when it has not complied with any provision of this code relating to foreign corporations; and in the same manner may file a bill to restrain any individuals from exercising any corporate rights, privileges, or franchises not granted to them by law; and on the filing of any such bill the said supreme court shall have power to issue an injunction as prayed and to exercise all the powers of a court of equity over the subject-matter of such bill. (Mar. 3, 1901, 31 Stat. 1320, c. 854, sec. 793; June 30, 1902, 32 Stat. 534, c. 1329)."

"416. *Involuntary dissolution at the suit of creditors.—When any corporation in the District has remained insolvent for a year, or has neglected or refused for that period to pay and discharge its*

notes or other evidences of debt, or has, for that period, suspended its ordinary and lawful business, a bill may be filed by the district attorney, as aforesaid, for the dissolution of said corporation, or, if he shall decline to do so, on the application of any judgment creditor of said corporation, the said judgment creditor, if an execution upon his judgment shall be returned unsatisfied, in whole or in part, may file such bill. (Mar. 3, 1901, 31 Stat. 1320, c. 854, sec. 794)."

"417. Same; injunction against transferring assets; receiver.—Upon prima facie proof of the facts necessary to sustain such suit the court may issue an injunction restraining the corporation, its trustees, directors, and officers from collecting or receiving any debt or demand and from paying out or transferring or delivering to any person any of its property or effects and from exercising any of its corporate rights and franchises during the pendency of the suit, unless by permission of the court. And at any stage of the proceeding the court may appoint a receiver to collect and preserve the property of the corporation and dispose of and manage the same, under the direction of the court until final decree in the cause. (Mar. 3, 1901, 31 Stat. 1320, c. 854, sec. 795)."

"418. Same; parties.—Where the action is brought by a creditor, the stockholders, directors, trustees, or other officers, or any of them who may be made liable by law for the payment of the complainant's debt, may be made parties defendant by the original or a supplemental bill, and their liability may be declared and enforced by the decree; but nothing herein shall prevent any creditor from enforcing such liability in a separate suit against such parties. (Mar. 3, 1901, 31 Stat. 1321, c. 854, sec. 796)."

"419. Same; account and distribution.—In such suit, if the court shall be of opinion that the complainant is entitled to the relief prayed, and that such corporation ought to be dissolved, the court

shall cause an account to be taken of the assets and debts of the corporation and shall decree an equal distribution of the assets among the creditors, subject to existing liens; but if said corporation has no property to satisfy its creditors, or to the extent to which its property is insufficient therefor, the court may require the stockholders, who are parties defendant to the suit, to pay into court the amounts due and unpaid on the shares of stock held by them, and shall ascertain the amounts properly chargeable, in favor of creditors, to said stockholders and the trustees, directors, or other officers who are parties to the suit, and in the final decree for the dissolution shall adjudge and decree that said amounts shall be paid into court by the parties respectively liable therefor, to be applied to the payment of the debts of the corporation (Mar. 3, 1901, 31 Stat. 1321, c. 854, sec. 797)."

"396. Same; receiver.—A director, trustee, or other officer of the corporation, or any of its stockholders, may be appointed a receiver, and any receiver so appointed shall give bond in such penalty, and with such surety or sureties, as may be approved by the court, conditioned for the due discharge of his duties as receiver (Mar. 3, 1901, 31 Stat. 1317, c. 854, sec. 773)."

"*397. Same; receiver to be vested with corporate property.—Upon his giving surety as aforesaid the receiver shall be vested with all the estate, real or personal, of the corporation, for the benefit of its creditors and stockholders* (Mar. 3, 1901, 31 Stat. 1317, c. 854, sec. 774)."

IN THE

Supreme Court of the United States

OCTOBER TERM 1940

No. 262.

THE SHAW-WALKER COMPANY, a corporation, and ROBERT B. HILLYARD and WALTER S. HILLYARD, doing business as Shine-All Sales Company, and LEAH B. WILSON, *Petitioners,*

v.

THE NATIONAL BENEFIT LIFE INSURANCE COMPANY, a corporation, and GILBERT A. CLARK and FRANK B. BRYAN, JR., Receivers of The National Benefit Life Insurance Company, a corporation (appointed in Equity Cause No. 53,391), *Respondents.*

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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IN THE

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No. 262.

THE SHAW-WALKER COMPANY, a corporation, and ROBERT B. HILLYARD and WALTER S. HILLYARD, doing business as Shine-All Sales Company, and LEAH B. WILSON, *Petitioners,*

v.

THE NATIONAL BENEFIT LIFE INSURANCE COMPANY, a corporation, and GILBERT A. CLARK and FRANK B. BRYAN, JR., Receivers of The National Benefit Life Insurance Company, a corporation (appointed in Equity Cause No. 53,391), *Respondents.*

BRIEF FOR RESPONDENTS.

STATEMENT OF CASE.

Respondents deem a statement of the case is necessary in order to correct the inaccuracies and omissions in the Petition for Writ of Certiorari. They also rely upon the statement appearing in the opinion of the United States Court of Appeals for the District of Columbia (R. 500-503).

The decision of the United States Court of Appeals for the District of Columbia (R. 500-516), of which review is

here sought by petitioners, reversed the decree of the District Court of the United States for the District of Columbia (Mr. Justice Gordon) establishing a receivership in a statutory dissolution proceeding, hereinafter referred to as the "Shaw-Walker case", brought under the District of Columbia Code, for The National Benefit Life Insurance Company, a District of Columbia corporation, and holding that a prior equity receivership, in a proceeding hereinafter referred to as the "Pinkett case", had been created by the same court in excess of its jurisdiction and was superseded by the statutory proceeding and receivership (R. 130-133).

The National Benefit Life Insurance Company in June 1931 was in serious financial difficulties and its license to do business had been suspended in several States; new officers of the company were elected in that month, and the following month the company ceased writing new insurance (R. 138-144, 151-152, 322). On September 10, 1931, a bill seeking a receivership was filed by John Randolph Pinkett, a stockholder, officer and policyholder, alleging the company's insolvency, heavy impairment of its capital and legal reserves, and appointment of receivers in various states; it prayed a receivership to manage the corporation, and that upon final hearing such receivership might be made permanent,

> "and that such action may be taken by the Court, by way of dissolution of said corporation, or in such other manner as to the Court may seem just and proper and the equities of the case demand."

(R. 136-149).

After hearing, the Court on September 24, 1931, appointed a receiver pendente lite (R. 149-150); thereafter that receiver reported on the company's net worth, valuing assets on the best data then available, and suggested possible reorganization as a mutual company (R. 214-224). On December 9, 1931, the defendant corporation filed its

answer, verified by its President, John T. Risher, admitting the material allegations of the bill, and favoring an operating receivership (R. 150-154).

On final hearing, after testimony and argument, the court (Mr. Justice O'Donoghue) on February 19, 1932, delivered its opinion (R. 154-157) and on February 29, 1932, entered its decree (R. 157-158), expressly finding the company insolvent; said decree appointed Gilbert A. Clark and Frank B. Bryan, Jr., permanent receivers, and empowered them to carry on the business and administer the affairs of the company (with the exception of writing new insurance), to take possession of all its books, records, assets and properties, real and personal, and to have made an actuarial report and account of its affairs. Interference with said receivers was enjoined.

After the filing of the Pinkett bill, ancillary proceedings were instituted in eleven of the states in which the company did business (R. 160-165). With the Court's approval, under its order of April 8, 1932 (R. 270-277), the receivers modified or revived more than 65,000 previously existing policies. No new policies were written. The actuarial report showed the company's insolvency and the heavy impairment of legal reserves (R. 161). The receivers attempted to dispose of the modified business by sale or reinsurance, but without success, and no feasible plan for rehabilitation was presented (R. 160-165).

On August 31, 1933, the Court directed the receivers to discontinue collection of premiums, to sell all the company's property and to hold the proceeds for distribution to the parties entitled (R. 159-160). Pursuant to said order, the receivers liquidated the company's assets, in the District of Columbia and in the various States in which it had operated. The courts of the ancillary jurisdictions, relying upon the order appointing the receivers, and the order of liquidation, in the Pinkett case, turned over their net assets to the Pinkett receivers and remanded their claimants to the domiciliary court (R. 162-165).

On December 8, 1937, the receivers filed their report and account showing the results of liquidation (R. 160-169, 419-424;) the court referred the cause to the Auditor, and notice by publication was given to all policyholders and other creditors to file formal proofs of claim (R. 169-171).

In February, 1938, the Shaw-Walker Company and the intervening judgment creditors, petitioners herein, filed proofs of claims on their respective judgments with the Pinkett receivers (R. 100-102). John T. Risher and one of counsel for appellees (petitioners herein) also filed claims with the Pinkett receivers (R. 165-166).

The present statutory proceeding, Equity No. 55677—the Shaw-Walker case,—was begun May 12, 1933; process was served on John T. Risher, president of the defendant corporation (R. 439), who, being under injunction against interference with its affairs, transmitted said process and a copy of bill to the Pinkett receivers for whatever action they cared to take; counsel for Shaw-Walker Company also sent copy of the bill to one of counsel for said receivers (R. 439-440, 450-451). The bill alleged the company's insolvency and suspension of business, its ownership of property in the District of Columbia and elsewhere, and plaintiff's judgment against it, with return of execution "nulla bona"; it attacked the court's jurisdiction in the Pinkett case because of alleged defects in the bill, and prayed dissolution of the corporation, appointment of receivers who would "supersede" the Pinkett receivers, injunction against said Pinkett receivers, sale of the company's property and distribution of proceeds, and payment of plaintiff's claim, interest and costs (R. 1-10).

Robert B. Hillyard and Walter S. Hillyard, judgment creditors, and Leah B. Wilson, a policyholder, intervened and joined in the prayers of the bill (R. 120, 178-203). No other policyholder is a party to the proceeding.

The Pinkett receivers appeared for the corporation and moved to dismiss the suit; it was held by Mr. Justice Adkins that the court in the Shaw-Walker case had power to

dissolve the corporation but not to interfere with the liquidation then proceeding in the Pinkett case, and the motion was overruled (R. 11-13). The defendant corporation through its receivers then answered the bill (R. 14-18).

On December 10, 1937, the Shaw-Walker case came on for final hearing before Mr. Justice Gordon (R. 23); after hearing and argument the court took the case under advisement (R. 24-100), and on November 15, 1938, filed its opinion (R. 106-117), holding the court in the Pinkett case was without jurisdiction to appoint receivers, and that the Shaw-Walker case supersedes the Pinkett case.

Motion for rehearing was overruled (R. 117, 118), as was a motion made on July 19, 1938, for leave to file a supplemental answer setting forth the filing of proofs of claim in the Pinkett receivership by plaintiff and the intervening judgment creditors (petitioners herein) (R. 100-106).

On March 6, 1939, the court (Mr. Justice Gordon) made its Findings of Fact and Conclusions of Law (R. 118-130), and entered its decree (R. 130-133), holding that the court in the Pinkett case was without jurisdiction, that the order therein appointing receivers was void, and that the Shaw-Walker case "supersedes" the Pinkett case, all proceedings in which were permanently stayed; John T. Risher was appointed receiver, the Pinkett receivers were enjoined from acting as such, and directed to deliver all properties of the corporation in their possession; and fees were allowed to the attorneys for plaintiff and intervenors.

The defendant corporation and its receivers in the Pinkett case thereupon noted and perfected an appeal to the United States Court of Appeals for the District of Columbia (R. 133-134). Appellees (petitioners herein) moved to dismiss the appeal (R. 425-448). A purported consent of the corporation to said motion was filed at the direction of John T. Risher (R. 462-472). Appellees also moved for hearing before the Chief Justice and five Associate Justices of said Court of Appeals (R. 475-476). All said motions were overruled (R. 476, 516).

The Court of Appeals heard the case May 15, 1939 (R. 477). Its decision was rendered January 8, 1940 (R. 500-515) (111 F. 2d 497).

Appellees on January 23, 1940, filed a motion (R. 517-562) for a rehearing before the full bench, or in the alternative a stay of the mandate

> "pending an application *to be made by appellees* for allowance of writ of certiorari * * *" (R. 562). (Italics supplied.)

On May 18, 1940, petitioners filed in this Court a petition, not incorporated in the record, seeking an extension of time for filing petition for certiorari, and stating as a cause for such extension that

> " * * * it *has just been decided* to incur the expense"

of printing additional record, petition and brief. (Italics supplied.) The petition further stated that the extension of time would not operate as a hardship upon any one involved in the litigation, without revealing to the Court that the proceedings for liquidation and distribution to creditors in the Pinkett receivership had remained dormant since the Shaw-Walker decree of March 6, 1939, and would have to remain dormant until the determination of the petition for certiorari.

Extension of time was granted, and the instant petition for writ of certiorari was thereafter filed.

ARGUMENT.

I.

THE CASE INVOLVES PRIMARILY A MATTER OF LOCAL LAW.

Respondents submit that the petition for writ of certiorari should be denied, because the matter primarily involved is the application of the local dissolution statute of the District of Columbia and its effect on the general equity jurisdiction of the District Court of the United States.

This Court will not ordinarily review decisions of the United States Court of Appeals for the District of Columbia which are based upon statutes confined in their operation to the District of Columbia.

Del Vecchio v. *Bowers*, 296 U. S. 280, 285.

II.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA WAS RIGHT AND SHOULD NOT BE DISTURBED.

The United States Court of Appeals for the District of Columbia was right in reversing the decree of the District Court of the United States for the District of Columbia (Gordon, J.) in the Shaw-Walker case, because of errors of that decree in denying the jurisdiction of the same court in the Pinkett case.

The Pinkett case was not designed for statutory dissolution and incidental receivership, but was intended to invoke, and was sufficient to invoke, the Court's general equity jurisdiction. The Court had jurisdiction over the subject-matter, over the parties, and over the *res*.

Cooper v. *Reynolds*, 10 Wall. 308, 315, 316;
Binderup v. *Pathe Exchange, Inc.*, 263 U. S. 291, 305-306.

The primary question in issue in this appeal was whether the District Court, in the statutory proceeding, could declare void for want of jurisdiction the prior decree of another Justice of the same Court, appointing receivers for the same corporation in the equity case. That jurisdiction was one of the questions necessary to be determined in the Pinkett case, and any error in deciding it would not authorize even the same Court, in a collateral suit, to treat the decree as void.

Mellen v. *Moline Iron Works*, 131 U. S. 352, 367;
Shields v. *Coleman*, 157 U. S. 168, 178;
Johnson v. *Manhattan Railway Co. et al.*, 289 U. S. 479, 496.

The decision of Mr. Justice Gordon erroneously assumed that receivership can be had only as an incident to a statutory dissolution. His further attempt to "supersede" the equity receivership by the statutory one was an arbitrary assumption of power. In the reversal of that attempt, both priority of taking possession of property and the stage of advancement of liquidation, domiciliary and ancillary, are material considerations.

Lion Bonding and Surety Co. v. *Karatz*, 262 U. S. 77;
Harkin v *Brundage*, 276 U. S. 36;
Penn General Casualty Co. v. *Commonwealth of Pennsylvania*, 294 U. S. 189, 195, 196;
Kessler v. *William Necker, Inc.*, 258 Fed. 654, 661-2.

There is no principle of comity which authorizes one judge to substitute his discretion for that of others of the same Court previously exercised.

Hardy v. *North Butte Mining Co.*, 22 F. (2d) 62;
Humphrey v. *Bankers Mortgage Co.*, 79 F. (2d) 345, 352;
Johnson v. *Manhattan Railway Company, supra.*

III.

REPLY TO PETITIONERS' ARGUMENT.

Petitioners' contentions appear to be grouped under the six heads of their brief (pp. 44-57), to which respondents make the following reply:

1.

The Pinkett Receivers Had the Right to Appeal.

Throughout the entire Shaw-Walker proceedings the defendant corporation participated by its receivers, who represented the interests of the owners of the property of which they were in charge. Their participation was with the knowledge and acquiescence of the Court, of plaintiff and intervenors (petitioners herein) and their counsel, and of Risher, president of the corporation, and was not questioned by any proceeding in the cause (R. 1-133, 439-440).

The many assertions of petition and brief to the contrary, there has been no decree of dissolution of the corporation (R. 117, 131). The appeal was taken from a decree denying the jurisdiction of the equity court and enjoining its receivers from carrying out its orders. The receivers believed it was not only their right but their duty to uphold the jurisdiction of the appointing court. The proceedings being adversary, they did not need the consent of the court for that purpose. The right to make the defense inhered in their office.

> *Goodman Manufacturing Co.* v. *Pittsburg & Buffalo Co.*, 222 Fed. 144, 146.

As said by Mr. Justice Taft, in *Felton* v. *Ackerman*, 61 Fed. 225, 226:

> "Where the appeal is in the interest of the property, and therefore in the interest of all who shall thereafter be shown to have any right to the property, it is quite convenient and proper that the receiver

should be allowed to conduct the appellate proceedings."

The decree appealed from attempted to subject not only the corporation but the receivers to its restraint. They have the further right to contend against claims made against them; for this purpose they occupy the position of parties to the suit although officers of the court, and after a final decree they have the right of appeal.

Hinckley v. *Gilman etc. R. R. Co.*, 94 U. S. 467, 469;
Shields v. *Coleman*, 157 U. S. 168, 179-180;
Bosworth v. *St. Louis Terminal R. R. Association*, 174 U. S. 182, 188;
In re Hudson River Electric Power Co., 173 Fed. 934, 956.

2.

The Refusal of the Court of Appeals to assign the Chief Justice and five Associate Justices to hear the Oral Argument is not ground for Certiorari.

While ordinarily the refusal of this Court to grant certiorari on a particular point is not authority for a similar refusal when the same point is again raised, it is respectfully submitted that the Court's denial of a number of petitions in which the point was raised is ground for asking the denial of the instant petition.

Few, if any, cases have been heard by six justices of the United States Court of Appeals for the District of Columbia. If, as contended by the petitioners (Petitioners' Brief p. 51) that Court

> "has no power or authority to decide cases or to transact business by less than the full number of its members",

the result on hitherto unquestioned adjudications would be chaotic. If this Court has ever had any question as to the authority of the Court of Appeals to act by three of its

members, presumably it would have long since resolved that question.

Further, the petitioners here for the first time raise this point as a legal and constitutional question. In the Court of Appeals, their first motion (R. 475) assigned no reason in support of that part of the motion. Their motion for rehearing (R. 517-562) was not based on any constitutional or legal point, but was addressed to the discretion of the Court (R. 561-562), and the entire motion was in the alternative for either a rehearing or a stay of the mandate.

3.

None of Petitioners' Cited Decisions of this Court, Circuit Courts of Appeal or Local Courts is Applicable, in Fact or in Law, to the instant Case.

In *Relf* v. *Rundle,* 103 U. S. 222, (Petitioners' Brief, p. 52) the Missouri statute provided that the Superintendent of the State Insurance Department might institute proceedings for dissolution of an insolvent insurance company; upon dissolution its assets should vest in the Insurance Department for benefit of creditors. It was held that under the statute Relf, as such superintendent, had authority to sue outside the state.

The insolvent corporation in *Curran* v. *Arkansas,* 15 Howard 304, was a State bank, of which the State was the sole stockholder; and this Court held invalid certain State legislation applying the bank's assets to payment of State expenses, as against claims of creditors.

In *Bernheimer* v. *Converse,* 206 U. S. 516, 534, and *Converse* v. *Hamilton,* 224 U. S. 243, 256-7, Converse was appointed receiver of an insolvent manufacturing company, in proceedings under a Minnesota statute authorizing the receiver to prosecute actions in Minnesota or elsewhere. The question involved was his right to enforce statutory liability of stockholders by suits in New York and in Wisconsin, and this Court held he had that right.

International Life Ins. Co. v. *Sherman*, 262 U. S. 346, (Petitioners' brief, p. 53) dealt with reorganization of an insolvent insurance company by merger with another company, and *National Surety Company* v. *Coriell*, 289 U. S. 426, with reorganization of a manufacturing corporation. Each case held that assenting creditors could not bind dissenting creditors or bar them from their proportionate share of the assets of the insolvent corporation.

Lovell v. *St. Louis Mutual Life Ins. Co.*, 111 U. S. 264, held that under a reinsurance agreement effected in a suit by the State Superintendent of Insurance under the Missouri statute, a policyholder might have the value of his policy either in insurance in the new company or from the assets of the old company.

In *Carr* v. *Hamilton*, 129 U. S. 252, (Petitioners' brief, p. 54) an insolvent Missouri life insurance company was said to become *civiliter mortuus* upon its liquidation in proceedings instituted under the statute by the Superintendent of the Insurance Department.

In *Sterrett* v. *Second National Bank of Cincinnati*, 246 Fed. 753, affirmed 248 U. S. 73, an Alabama statute, and in *McConnell* v. *Hubbard*, 272 Fed. 961, a Tennessee statute, were held not to authorize receivers appointed thereunder to sue in another state.

None of the above-mentioned cases bears any similarity or is pertinent to the instant proceeding. None involved a question of priority between an equity receiver and a statutory receiver, or held that a statutory receiver "supersedes" an equity receiver, or that the title of a statutory receiver is "paramount" to the possession of an equity receiver.

Nor are the three local cases in point. (Petitioners' brief, pp. 54-55).

The question in *Johnston* v. *Davis*, 56 App. D. C. 15, 16, was the right of a debtor of a corporation in dissolution to set off his subsequent payment of its note bearing his endorsement.

In *Richards* v. *Geiger*, 39 App. D. C. 278, 284, an executor, by authority of the Probate Court, undertook to conduct decedent's bar-room business after its license had expired; it was held the probate court had no jurisdiction to give that authority. Neither the court's power to appoint executors, nor the validity of their appointment, was questioned or affected. (See R. 477-479).

Rapeer v. *Colpoys*, 66 App. D. C. 216, would seem to be authority in support of the decision of the Court of Appeals here complained of, since the decree of Mr. Justice Gordon, assuming to act as an appellate court and review the decision in the Pinkett case, clearly "transcends a limitation upon a court's fundamental power." See: *Ableman* v. *Booth*, 21 How. 506, 515.

4.

Title of the Receiver in the Shaw-Walker Statutory Dissolution Suit is not Paramount to Possession of the Pinkett Equity Receivers.

The District of Columbia statutes relating to dissolution of corporations (Chapter XVIII, Subchapter 14, Sections 768-797, Code of Law for the District of Columbia; Title 5, Chapter 13, Sections 391-419, Code of the District of Columbia, 1929) provide for voluntary dissolution, involuntary dissolution at suit of the United States, and involuntary dissolution at suit of creditors.

Voluntary dissolution may be had (Sections 768-785; 391-408) by petition of trustees, directors or officers, or stockholders of the corporation; if the court finds dissolution advisable, a decree shall be entered dissolving the corporation and appointing a receiver, who may be an officer or stockholder of the company, and who shall be vested with all the estate of the corporation for the benefit of creditors and stockholders. (Sections 772-774; 395-397).

Involuntary dissolution at suit of the United States (Sections 786-793; 409-415) is not here pertinent.

The instant proceeding was brought for involuntary dissolution at the suit of creditors. (Sections 794-797; 416-419). Under those sections the appointment of a receiver is permissive.

The quotation by petitioners (Petition and Brief, p. 63) of said Sections 396-397 out of order, immediately following Sections 416-419, gives the erroneous impression that their provisions relate to the receiver permitted in involuntary dissolution under Section 416. A similar confusion of sections was attempted in the hearing below (R., 32, 39-43, 47-51).

None of the cases cited under heading 4 of the petitioners' argument (Petitioners' brief, p. 56) is authority for the contention therein.

In *People* v. *New York City Railway Company*, 107 N. Y. S. 247 (1907), after the appointment of an equity receiver for the Railway Company in the federal court (see 157 Fed. 440), receivers were appointed in the state court under the state statute, with instructions not to interfere with the possession of the federal receivers, but to request the federal court to relinquish the property. The federal court did not comply with the request. In *Re Metropolitan Street Railway* (In *re Reisenberg*), 208 U. S. 90, 107, 111, the state receivers submitted petitions on the subject, but this Court upheld the federal receivership.

In *Wilmer* v. *Atlanta & Richmond Air Line*, 2 Woods 409, 30 Fed. Cas. 72, 79, No. 17775 (incorrectly cited in petitioners' brief) the federal court denied a writ of assistance in a conflict of jurisdiction between a Georgia receivership and a South Carolina receivership for a railroad extending into each state. The federal court said interference might create an unseemly collision between the two courts, contrary to the comity which should exist; that the test was, which court first acquired jurisdiction over the property.

The other cases cited were discussed *supra*.

5.

The Rights of Creditors of Defendant Corporation are Fully Protected in the Equity Receivership, which is not Superseded by the Decree in the Statutory Proceeding.

As previously mentioned, there has been as yet no decree of dissolution of the defendant corporation.

In *People* v. *Commercial Alliance Life Insurance Co.*, 154 N. Y. 95 (Petitioners' Brief, p. 56), an action brought by the Attorney General to dissolve a life insurance company, it was held that valuation of policies was determined as of the date the court took possession of the assets for distribution among creditors.

That principle is not controverted. The court in the Pinkett case set the close of business on September 9, 1931, the day preceding the filing of the bill of complaint, as the time of fixing valuations of equities of policyholders in the company's assets (R., 270, 275, 161). The rights of all creditors have been fully protected in that case. (R., 126 (Finding of Fact No. 16); 154-157; 160-169; 169-171.)

None of the cases cited in petitioners' brief (pp. 52-58) in support of the propositions that a statutory dissolution receiver "supersedes" a prior equity receiver, and that title of the statutory receiver is "paramount" to possession of the equity receivers, is authority on either point. *People* v. *New York City Railway, supra,* is the only case cited in which the question arose, and this Honorable Court (*Re Metropolitan Railway, supra*) decided it in favor of the equity receivership.

6.

The United States Court of Appeals had Jurisdiction to Reverse the Decree in the Shaw-Walker Case.

The argument under heading No. 6 (Petitioners' brief p. 56) misconstrues the cause at issue. There has been no appeal in the Pinkett case in which the United States Court

of Appeals for the District of Columbia might hold valid the decrees made therein. What was decided in the instant case was that Mr. Justice Gordon in the Shaw-Walker case erred in holding that the court was without jurisdiction in the Pinkett case, and in holding that the Shaw-Walker receivership superseded the Pinkett receivership.

The provisions of the District of Columbia statutes relating to the conduct of life insurance business (some of which are cited in the Record, pp. 482-486) have no application here; the license of the corporation to do business in the District was never revoked or suspended (R. 478). The "business" which the Receivers were directed to "carry on" (R. 149, 157) was that of a company which had already ceased to write insurance (R. 322), and the direction to "carry on", to the knowledge of the Superintendent of Insurance of the District (R. 139, 151-2, 215) empowered the receivers only to collect premiums and conserve existing insurance looking to a possible rehabilitation or ultimate liquidation.

There is no support in the record for the erroneous statement (Petitioners' Brief, p. 55) that the equity court authorized and directed the receivers "to operate an insolvent life insurance company in violation of local statutes, without a license from the local insurance department."

IV.

THE CHARGES CONCERNING WRONGFUL ORDERS OF THE COURT AND IMPROPER ACTIONS OF THE RECEIVERS HAVE NO BEARING UPON THE GRANTING OF THE WRIT OF CERTIORARI.

The bill in the Shaw-Walker case, based on the insolvency of the defendant corporation and its failure to pay a judgment, makes no charges concerning wrongful orders of court or improper actions of receivers in the Pinkett case. Such complaints are made in the intervening petition of Leah B. Wilson, who was not a judgment creditor but was entitled to relief under that bill only as a policyholder.

At the hearing respondents contended that questions concerning the conduct of the receivership could be heard in the Pinkett case only, and not in a collateral proceeding (R. 62-63). No proof of mismanagement was offered; the trial court specifically refused to consider the charges against the Pinkett receivers (R. 35-36, 89-90) and did not refer to them in opinion (R. 106-117) or in Findings of Fact (R. 118-129). Likewise the Court of Appeals held those questions should be raised, not by collateral attack, but in the Pinkett case (R. 511, 512-513).

To herein pass upon the truth of those charges, or their justification if true, this Court would be required to assume the functions of a *nisi prius* court and take evidence and make findings. The repetition of the charges at this time merely befogs the issue; and the delay occasioned by the actions of petitioners necessarily postpones the time when the District Court in the Pinkett case may scrutinize the receivership proceedings, as recommended by the Court of Appeals (R. 514), and the receivers may account for their trust.

CONCLUSION.

It is submitted that the petition for the writ of certiorari should be denied, thereby enabling the District Court to proceed expeditiously in accordance with the decision of the Court of Appeals.

Respectfully submitted,

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